

Tuan Phuong Nguyen
NAME
F-20604
PRISON NUMBER

P.D. Box 901, Imperial
CURRENT ADDRESS OR PLACE OF CONFINEMENT

Valley, California 92251
CITY, STATE, ZIP CODE

FILED

NOV 19 2007	
CLERK, U.S. DISTRICT COURT	
SOUTHERN DISTRICT OF CALIFORNIA	
BY	RJM
DEPUTY	

2254	✓ 1983
FILING FEE PAID	
Yes	No ✓
HPP MOTION FILED	
Yes	No ✓
COPIES SENT TO	
Court	✓ Pros.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Tuan Phuong Nguyen
(FULL NAME OF PETITIONER)

PETITIONER

v.

V.M. Almager (A) Warden,
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

The Attorney General of the State of California, Additional Respondent.

'07CV 2213 L RBB

Civil No.

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY.

1. Name and location of the court that entered the judgment of conviction under attack: SUPERIOR COURT, ORANGE COUNTY, CALIFORNIA
2. Date of judgment of conviction: OCTOBER 7, 2005
3. Trial court case number of the judgment of conviction being challenged: 05CF1163
4. Length of sentence: FIVE YEARS

5. Sentence start date and projected release date: March 10, 2006

6. Offense(s) for which you were convicted or pleaded guilty (all counts): PENAL CODE
Section 67, Count ONE thru SEVEN

7. What was your plea? (CHECK ONE)

- (a) Not guilty
- (b) Guilty
- (c) Nolo contendere

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)

- (a) Jury
- (b) Judge only

9. Did you testify at the trial?

Yes No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?

Yes No

11. If you appealed in the California Court of Appeal, answer the following:

- (a) Result: Affirming Superior Court Judgment
- (b) Date of result, case number and citation, if known: JUNE 13, 2007; Case No: 6036837
- (c) Grounds raised on direct appeal: TRIAL COURT PREJUDICIALLY ERRED IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO DISCLOSE MATERIAL EVIDENCE IN RESPONSE TO POST-TRIAL PLETHNESS MOTION; DENYING A NEW TRIAL

12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:

- (a) Result: DENIED "Ex Banc."
- (b) Date of result, case number and citation, if known: 9/25/07; S154677

- (c) Grounds raised: ERRED IN ELEVATING THE STANDARD OF REVIEW AT A POST-TRIAL "PLETHNESS" MOTION FROM "MATERIALITY" TO PREJUDICE. ERRED IN FINDING NO CUNNINGHAM VIOLATION WHERE THE TRIAL COURT IMPOSED THE CONSECUTIVE TERMS FOR ALL COUNTS BASED ON FACTORS IN AGGRAVATION NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: _____

(b) Date of result, case number and citation, if known: _____

(c) Grounds raised: _____

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

Yes No

15. If your answer to #14 was "Yes," give the following information:

(a) California Superior Court Case Number: _____

(b) Nature of proceeding: _____

(c) Grounds raised: _____

(d) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(e) Result: _____

(f) Date of result: _____

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

Yes No

17. If your answer to #16 was "Yes," give the following information:

- (a) California Court of Appeal Case Number: _____
- (b) Nature of proceeding: _____

- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result: _____

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?

Yes No

19. If your answer to #18 was "Yes," give the following information:

- (a) California Supreme Court Case Number: _____
- (b) Nature of proceeding: _____

- (c) Grounds raised: _____

- (d) Did you receive an evidentiary hearing on your petition, application or motion?
 Yes No
- (e) Result: _____
- (f) Date of result: _____

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:
-
-
-
-

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

Yes No (IF "YES" SKIP TO #22)

- (a) If no, in what federal court was the prior action filed? _____
 (i) What was the prior case number? _____
 (ii) Was the prior action (CHECK ONE):
 Denied on the merits?
 Dismissed for procedural reasons?
 (iii) Date of decision: _____
 (b) Were any of the issues in this current petition also raised in the prior federal petition?
 Yes No
 (c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?
 Yes No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
 - **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
 - **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.
-

GROUND FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** THE TRIAL COURT'S ERRED DEPRIVED PETITIONER OF DUE PROCESS AS WELL AS THE EFFECTIVE ASSISTANCE OF COUNSEL.

Supporting FACTS (state briefly without citing cases or law). THE PETITIONER FILED A MOTION FOR NEW TRIAL ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIAL OF DUE PROCESS BASED UPON THE TRIAL COURT'S FAILURE TO DISCLOSE INFORMATION FOUND IN DEFECTIVE LIMO'S FILE. (2CT. pg. 358-381.) THIS PROFOUND MECHANISM FOR CRIMINAL DEFENSE DISCOVERY [THE PITCHERS MOTION]... MUST BE VIEWED AGAINST THE LARGER BACKGROUND OF THE PROSECUTOR'S CONSTITUTIONAL OBLIGATION TO DISCLOSE TO A DEFENDANT MATERIAL EXCULPATORY EVIDENCE SO AS NOT TO INFRINGE THE DEFENDANT'S RIGHT TO A FAIR TRIAL. THE MOTION ALLEGED IN PART THAT THE TRIAL COURT HAD IMPROPERLY DENIED DISCOVERY OF MATERIAL AND EXCULPATORY EVIDENCE CONTAINED IN LIMO'S PERSONNEL FILE. PETITIONER ARGUED THAT THE TRIAL COURT ERRED BY USING THE WRONG STANDARD, ASSESSING THE EVIDENCE IN LIMO'S FILE FOR ITS PERSUASIVE FORCE RATHER THAN ITS MATERIALITY ONLY. "HUS THE COURT ADMITTED THERE WAS MATERIAL CONTAINED IN LIMO'S PERSONNEL FILE, THAT WOULD HAVE BEEN DISCLOSED PRIOR TO TRIAL." BUT LOOKING BACK IN RETROSPECT THUS THE TRIAL IS OVER, IT'S CLEAR THE COURT'S CONCLUSION THAT THE EVIDENCE WAS OF SUCH LITTLE PROBATIVE VALUE THAT (1), IT PROBABLY WOULD NOT HAVE BEEN

Did you raise GROUND ONE in the California Supreme Court?

Yes No.

admitted to begin with, but second of all, it would not have made a difference in the outcome of the defendant's trial. And it would not have raised a reasonable doubt concerning that particular officer's testimony. And though the New Trial Motion denied, the Court made clear that in determining whether or not to disclose material evidence, he assessed it under the standard for ruling on a motion for new trial on the grounds of ineffective assistance of counsel. Petitioner was required to show a reasonable probability that, but for Counsel's unprofessional error, the result of the proceeding would have been different before the trial court would disclose this evidence inside Limo's file. (R.T. pp. 232-233.) The Appeal, petitioner argued that the trial court erred in requiring him to demonstrate "prejudice" in the context of a discovery motion, even though made post-trial. The trial court thus created a "Catch-22" for the petitioner, because he could not in any way demonstrate the likely effect of "Undisclosed Evidence" on the trial outcome. Most significantly, the Court's ruling deprived petitioner of the opportunity to investigate the complaints against Limo, as trial cocaine would have been able to do if he had brought a timely "Pitchess" Motion. Thus petitioner was denied the chance to determine if there was other evidence that would have demonstrated sufficient misconduct on the part of detective Limo to justify a new trial. And thus the Court conducted an In Camera hearing and was transcribed, pages 192 thru 197 was sealed and placed in a separate envelope; examination of both detective "Limo and takeo" personnel records for evidence of "Solicitation of bribes, Complaints of false arrests, allegations of false police reports, and perjury." (R.T. pp. 188-197.) And no court can say with certainty whether or not given certain the opportunity of Undisclosed Evidence in Detective Limo file he would not have been able to raise a reasonable doubt concerning that particular officer's testimony, further support in argument with points and authorities see Appendix A pp. 13-15; Appendix B pp. b-1b; C pp. 2-8

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY
28 U.S.C. § 2254

(b) **GROUND TWO:** the Appeal Court erred in elevating the Standard of Review of the Post-Trial Pitchess Motion from "Materiality" to "Prejudice"

Supporting FACTS (state briefly without citing cases or law): Petitioner was convicted of six counts of bribing and execution officer - mainly Detective Limo, (paid) both Limo and Tolosa received money from him. Second and third occasions, the officers audiotaped the transaction. (2 C.t. pp. 440-450, 460-470.) Count one, two, the case against petitioner consisted of the testimony of detective Limo. (I.R.t. pp. 23-26.) Similarly, Count three, four (December 7/94) were founded upon Limo's testimony that petitioner was involved in the transaction [via cellphone], because petitioner was [not] present and his voice did appear on the audiotape. (I.R.t. pp. 27-32; 2C.t. pp. 438-452.) Count five, six, were founded upon both Limo's testimony and audiotape transaction with petitioner (I.R.t. pp. 38-40; 2C.t. pp. 453-472) ("Mind the Court without Audiotape Voice Expert Authentication"). However, no direct mention of money paid by petitioner on the tape. Thus the proof of bribery depended heavily upon the context of the conversation provided by detective Limo's testimony. Petitioner's trial counsel, "Frank Borilli," attempted to set up an entrapment defense. He attacked the credibility of the officers and suggested that they were misrepresenting the events that actually occurred. (I.R.t. pp. 64-79.) Borilli intimated at closing argument that petitioner was en-

Did you raise GROUND TWO in the California Supreme Court?

Yes No.

trapped by corrupt police who demanded bribes in order to allow his business to continue. However, Borillo NEVER CONDUCTED ANY INVESTIGATION, NOR filed any written DISCOVERY MOTION prior to trial, and thus could not impeach those officers with any prior misconduct that might have ERODED THEIR CREDIBILITY. (1 RT. pp. 111, 126; 2 CT. p. 255.) In particular, Borillo did NOT FILE A MOTION FOR DISCOVERY OF THE PERSONNEL RECORDS OF DETECTIVE LIMA AND TOLOSA following defendant (Petitioner) CONVICTION, HE REQUIRED NEW COUNSEL, "Kristin Erickson." Erickson IMMEDIATELY FILED A PITCHESS MOTION IN ORDER TO UNCOVER INFORMATION (COUNSEL Borillo failed to do), that would SUPPORT AN ARGUMENT IN A MOTION FOR NEW TRIAL, THAT COUNSEL "Borillo" WAS INEFFECTIVE; BEING DEFENDANT (Petitioner)'S COUNSEL. (2 CT. pp. 238-259.) THIS TRIAL COURT FOUND GOOD CAUSE AND EXAMINED THE PERSONNEL RECORDS OF LIMA AND TOLOSA IN CAMERA. IN ITS PUBLISHED OPINION, THE "Court of Appeal" CORRECTLY NOTED THAT TO INITIATE DISCOVERY VIA A POST-TRIAL PITCHESS MOTION, DEFENDANT (Petitioner) MUST DEMONSTRATE THE MATERIALITY OF THE INFORMATION TO THE PENDING LITIGATION, RATHER THAN THE PRECEDING TRIAL. THE PENDING "LITIGATION" WAS PETITIONER'S MOTION FOR NEW TRIAL ON GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL (AS STATED BELOW A), BASED UPON FORMER COUNSEL'S FAILURE TO MAKE A PITCHESS MOTION OR OTHERWISE INVESTIGATE ON ENTITLEMENT DEFENSE. TO PREVAIL ON HIS MOTION FOR NEW TRIAL, PETITIONER WAS REQUIRED TO SHOW A "REASONABLE PROBABILITY" THAT COMPETENT PERFORMANCE, I.E., A FULL INVESTIGATION AND PRESENTATION OF EVIDENCE OF LIMA'S MISCONDUCT WOULD HAVE LED TO A DIFFERENT RESULT - THAT IS, HE HAD TO SHOW THAT COUNSEL'S OMISSIONS WERE PREJUDICIAL. THIS REASONING WAS SOUND, APPEAL COURT ERRED. SEE APPENDIX A, pp. 10-17

(c) **GROUND THREE:** Appeal Court erred in finding no Cunningham violation where the trial court imposed consecutive terms for all counts based on factors in aggravation not found by the jury beyond a reasonable doubt.

Supporting FACTS (state briefly without citing cases or law): THE trial Court SENTENCED PETITIONER to the mid-term of three year on COUNT ONE, and one-third of the mid-term for each of COUNTS THREE AND FIVE, ONE YEAR EACH, RUN CONSECUTIVELY. (C.t. pp. 430-431, R.t. pp. 106a-1063.) IN IMPOSING CONSECUTIVE SENTENCES, the trial Court stated that: "THE CRIME charged in COUNT ONE WAS COMMITTED ON NOVEMBER 16, 2004. THE CRIME charged in COUNT THREE ON DECEMBER 1, 2004 AND IN COUNT FIVE ON JANUARY 25, 2005. ALTHOUGH THE ULTIMATE GOALS [sic] OF THE CRIMES CHARGED WAS TO KEEP THE POLICE FROM SHOOTING DOWN HIS HOUSE OF ILL REPUTATION [sic], THE DEFENDANT COMMITTED SEPARATE ACTS OF CRIME ON SEPARATE OCCASIONS SO AS TO PRECLUDE THE IDEA THAT THE CRIMES WERE COMMITTED DURING A SINGLE PERIOD OF OBFUSCATE [sic] BEHAVIOR." THEREFORE, THE SENTENCE FOR COUNTS THREE AND FIVE WILL BE RUN CONSECUTIVE TO COUNT ONE, ONE-THIRD THE MID-TERM VIOLATING P.C. SEC. § 67 IS ONE YEAR, WHICH HEREBY IS IMPOSED ON COUNTS THREE AND FIVE. THE COURT APPARENTLY RELIED UPON RULE 4.425(a)(3), WHICH PROVIDES AS FOLLOWS: "CRITERIA AFFECTING THE DECISION TO IMPOSE CONSECUTIVE RATHER THAN CONCURRENT SENTENCES INCLUDE, (A) FACTS RELATING TO THE CRIMES, INCLUDING WHETHER OR NOT - (3) THE CRIMES WERE COMMITTED AT DIFFERENT TIMES OR SEPARATE PLACES, AS TO INDICATE A SINGLE PERIOD OF OBSCURE BEHAVIOR." BY

Did you raise GROUND THREE in the California Supreme Court?

Yes No.

the trial Court imposing "consecutive" sentences without
jury finding, "Beyond a reasonable doubt," that this
factor were indeed, true. The sentence is impermissible.
Petitioner was deprived of [H]is right to a jury trial as
to this factor. Further Support and Argument with points
and Authorities. SEE Appendix A. pp. 18-24.

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(d) **GROUND FOUR:** _____

Supporting FACTS (state *briefly* without citing cases or law): _____

Did you raise GROUND FOUR in the California Supreme Court?

Yes No.

23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?

Yes No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: _____

(b) Case Number: _____

(c) Date action filed: _____

(d) Nature of proceeding: _____

(e) Grounds raised: _____

(f) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: _____

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: Frank Barillo following Petitioner Conviction: Kristin Erickson, 8502 E. Chapman Ave., #305, Orange, CA 92869

(e) On appeal: Lise M. Berkley, 5750 Amaya Drive, Unit 8, La Mesa, California 91942

(f) In any post-conviction proceeding: Pitches Motion by Counsel Erickson, with trial Court.

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

28. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY) *In Pro per*

I declare under penalty of perjury that the foregoing is true and correct. Executed on

11/4/2007

(DATE)

SIGNATURE OF PETITIONER

In Pro per

VERIFICATION

STATE OF CALIFORNIA) On this day, Listed Court Pleadings Were Given
 COUNTY OF IMPERIAL) To Prison Official For Filing/Mailing
 (C.C. P. §446 & 2015.5; 28 U.S.C. §1746

I, JUAN - P - NGUYEN, declare under penalty of perjury that:
 I am the party in the above-entitled action; I have read the foregoing documents and know the contents thereof; and the same is true of my own knowledge except as to matters stated therein upon information and belief, and as to those matters, I believe they are true:

Executed this 4 day of November, 2007, at Centinela State Prison, P.O. Box 901, Imperial, CA 92251

[Signature] E

DECLARANT/PRISONER

PROOF OF SERVICE BY MAIL

(C.C.P. Sec. §1013 (a) & 2015.5; 28 U.S.C. Sec. §1746.)

I, Eugene Hill, am a resident of Centinela State Prison, in the County of Imperial, State of California; I am over the age of eighteen (18) years and am not a party of the above-entitled action. My state prison address is:

Centinela State Prison, P.O. Box 901, Imperial, CA 92251.

On 11/4/1, 2007, I served the foregoing:

Petition 15 pages Under 28 U.S.C. for Writ of Habeas
 With Attached Reporter, and Clerk's Transcripts, and
 In addition Appendix A thru E.

(Set forth the exact title of document (s) served.)

on the part (s) herein by placing a true copy (s) thereof, enclosed in a sealed envelope (s), with postage thereon fully paid, in the United States Mail, in a deposit box so provided at Centinela State Prison, P.O. Box 901, Imperial, CA 92251, addresses:

United States District Court, Room 46298
 Southern District of California
 880 Front Street, San Diego, CA
 92101-8900

Office of the Attorney
 General
 110 West "A" Street, Suite:
 110B,
 San Diego, Calif. 92101

There is delivery service by United States Mail at the so addressed, and/or there is regular communication by mail between the place of mailing and the place so addressed. I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11/4/1, 2007

Eugene Hill
 DECLARANT/PRISONER

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Introduction

This case arises out of an ongoing investigation of the Happy Tanning Salon at 311D-West Seventeenth Street, in Santa Ana, for recurring prostitution-related (said) activities. On four occasions (said) supplied cash payments to Detective Lima and to DSA, apparently to persuade them to release arrested individuals or to focus police attention on competitive businesses. And this petitioner was convicted of Counts One, Three and Five, to be served each consecutively. And stayed sentence on Count two, four, and six pursuant to Section 8654 of the P.C. all for liberty. The conviction however, consisted solely of the testimony of Detective Lima; yet because of the trial Court "Prejudicially Erred" in violation of petitioner's right to due process, and the ineffective assistance of counsel, by refusing to disclose material evidence (in part of his right to a fair trial) in his post-trial writless motion, by denying petitioner a new trial, his imprisonment is in violation of the "U.S. Constitution."

Date: 11/4/2007

Respectfully Submitted
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 In the One

1 R.t. pp. 23-26

Reporter's transcripts

1 R.t. pp. 23-26

Reporter's transcripts

1 SANTA ANA, CALIFORNIA - WEDNESDAY, OCTOBER 5, 2005

2 MORNING SESSION

3 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT IN THE
4 PRESENCE OF THE JURORS:)

5 THE COURT: BACK IN THE MATTER OF PEOPLE VERSUS
6 NGUYEN AND HAU. ALL PARTICIPANTS ARE PRESENT. MR. PEAR, YOU
7 MAY RESUME.

8 MR. PEAR: THANK YOU, YOUR HONOR.

9 Q INVESTIGATOR LIMA -- EXCUSE ME, DETECTIVE
10 LIMA, WHEN WE WERE -- WHEN WE RECESSED YESTERDAY, I JUST
11 ABOUT HAD CONCLUDED DISCUSSING WITH YOU THE HISTORY OF THE
12 VICE INVESTIGATION AT HAPPY TANNING THAT HAD GONE ON DURING
13 THE PERIOD NINE OR TEN MONTHS OF THE YEAR 2004 UP TO NOVEMBER
14 16TH OF 2004, BUT BEFORE I GET TO NOVEMBER 16TH AND THE
15 ACTIVITIES THAT OCCURRED THAT DAY, WITH REGARDS TO MR. HAU,
16 WAS THERE SOME CONVERSATION THAT YOU HAD WITH HIM BEFORE
17 NOVEMBER OF 2004 REGARDING HIS CONNECTION, IF ANY, WITH HAPPY
18 TANNING?

19 A YES, SIR.

20 Q AND WHEN DID THAT OCCUR, IF YOU RECALL?

21 A IN THE MIDDLE OF MARCH OF 2000 AND 4.

22 Q AND WHAT WERE THE CIRCUMSTANCES OF THAT
23 CONVERSATION?

24 A I SPOKE WITH HIM BECAUSE I TOLD HIM WE WERE
25 INVESTIGATING HIM FOR BEING INVOLVED WITH THE HOUSE OF
26 PROSTITUTION. HE TOLD ME HE WAS THE MANAGER OF THE LOCATION

1 AND THAT ACTIVITY WAS NOT OCCURRING THERE.

2 Q IN YOUR VISITS TO HAPPY TANNING IN THE MONTHS
3 BEFORE NOVEMBER OF 2004, DID YOU ALSO, BESIDES MR. HAU AND
4 MR. TUAN NGUYEN, COME IN CONTACT WITH A MRS. HUONG NGUYEN,
5 H-U-O-N-G?

6 A YES, SIR.

7 Q ON APPROXIMATELY HOW MANY OCCASIONS?

8 A BEFORE NOVEMBER OF 2000 AND 4 I WOULD SAY
9 EASILY FIVE TO TEN DIFFERENT TIMES.

10 Q WHAT, IF ANY, CONNECTION DID SHE HAVE WITH THE
11 DEFENDANTS OR THE BUSINESS?

12 A SHE WAS THE HUSBAND OF MR. NGUYEN.

13 Q OR THE WIFE?

14 A I'M SORRY, THE WIFE OF MR. NGUYEN AND WAS ALSO
15 INVOLVED IN THE BUSINESS, RUNNING THE BUSINESS, AND SHE ALSO
16 HAD BEEN ARRESTED FOR PROSTITUTION OUT OF THE BUSINESS.

17 Q AT ANY OF YOUR CONTACTS AT HAPPY TANNING IN
18 THE NINE OR TEN MONTHS BEFORE NOVEMBER THE 16TH OF 2000 AND
19 4, HAD MR. TUAN NGUYEN GIVEN YOU OR OFFERED YOU ANY MONEY AT
20 ANY TIME?

21 A BEFORE NOVEMBER 16TH, NO, SIR.

22 Q OR TO ANY OTHER OFFICERS IN YOUR PRESENCE?

23 A NO, SIR.

24 Q HAD YOU OR ANY OFFICERS IN YOUR PRESENCE EVER
25 ASKED MR. NGUYEN, PRIOR TO NOVEMBER 16TH OF '04, FOR ANY
26 MONEY OR ANYTHING ELSE OF VALUE?

1 A NO, SIR.

2 Q WITH REGARDS TO MR. HAU, BEFORE NOVEMBER THE
3 16TH OF 2000 AND 4, HAD YOU OR ANY OFFICERS IN YOUR PRESENCE
4 RECEIVED ANY MONEY OR THING OF VALUE FROM HIM?

5 A NO, SIR.

6 Q HAD YOU OR ANY OFFICER IN YOUR PRESENCE ASKED
7 OR REQUESTED ANY MONEY OR THING OF VALUE FROM MR. HAU?

8 A NO, SIR.

9 Q WITH REGARDS TO MRS. NGUYEN IN THE PERIOD
10 BEFORE NOVEMBER 16TH OF '04, HAD YOU OR ANY OFFICERS IN YOUR
11 PRESENCE RECEIVED ANY MONEY OR THING OF VALUE FROM HER?

12 A NO, SIR.

13 Q OR REQUESTED ANYTHING OF VALUE FROM HER?

14 A NO, SIR.

15 Q IN YOUR VISITS TO HAPPY TANNING IN YOUR
16 INVESTIGATIONS BEFORE NOVEMBER 16TH, '04, HAD YOU LOOKED AT
17 OR SEEN TANNING BEDS OR EQUIPMENT OF THAT NATURE?

18 A YES, SIR.

19 Q ON HOW MANY OCCASIONS?

20 A I WOULD SAY EVERY TIME I ENTERED THE LOCATION,
21 THEY ALWAYS HAD TANNING BEDS THERE.

22 Q DID YOU ON ANY OF THOSE OCCASIONS OBSERVE ANY
23 OF THOSE BEDS IN OPERATION?

24 A NOT AT ALL, SIR.

25 Q DID YOU EVER FIND ANYONE THERE WHO DID OR
26 COULD OPERATE THE TANNING BEDS?

1 A I DON'T THINK I EVER FOUND ANYONE. I ASKED,
2 AND NOBODY KNEW HOW TO OPERATE A TANNING BED, ANY OF THE
3 GIRLS THAT WORKED THERE.

4 Q ON NOVEMBER THE 16TH OF 2000 AND 4 AT
5 APPROXIMATELY 3:20 IN THE AFTERNOON, WERE YOU AND
6 INVESTIGATOR TOLOSA AT THE HAPPY TANNING SALON ON WEST 17TH
7 STREET IN SANTA ANA, ORANGE COUNTY, CALIFORNIA?

8 A YES, SIR.

9 Q ON THAT DATE AND TIME WAS AN ARREST MADE OF A
10 YOUNG LADY AT THE LOCATION FOR PROSTITUTION?

11 A YES, SIR.

12 Q AT SOME TIME AFTER YOU HAD ARRIVED AT THE
13 LOCATION, DID MR. -- DID DEFENDANT TUAN NGUYEN ARRIVE AT
14 HAPPY TANNING?

15 A YES, SIR.

16 Q DO YOU RECALL WHEN HE ARRIVED IN RELATIONSHIP
17 TO THE PROSTITUTION ARREST THAT OCCURRED?

18 A I WOULD SAY AFTER THE ARREST WAS MADE. HE
19 PROBABLY ARRIVED WITHIN 10 TO 15 MINUTES, NO LATER THAN THAT.

20 Q AND, IF YOU CAN RECALL, APPROXIMATELY HOW LONG
21 WERE YOU IN HAPPY TANNING BEFORE YOU HAD MADE THE ARREST OR
22 BEFORE THE ARREST WAS MADE?

23 A WITHIN MOMENTS OF US WALKING IN. FIVE MINUTES
24 AT THE MOST.

25 Q AND DO YOU RECALL WHAT, IF ANYTHING, YOU HAD
26 SEEN OR OBSERVED WHEN YOU WALKED IN THAT PRECIPITATED OR

1 CAUSED THIS PROSTITUTION ARREST?

2 A I BELIEVE THE FEMALE NAMED TIFFANY MAI IN THE
3 BACK ROOM WITH ANOTHER GENTLEMAN. I HAD PREVIOUSLY SEEN HER
4 THERE AND ARRESTED HER FOR LOITERING WITH THE INTENT TO
5 COMMIT PROSTITUTION ACTIVITY. I TOLD HER IF SHE VIOLATED
6 THIS CRIME AGAIN, SHE WOULD BE ARRESTED. AT WHICH POINT I
7 PLACED HER UNDER ARREST.

8 Q WHEN YOU ARRIVED THERE, WAS SHE IN SOME ROOM
9 WITH AN INDIVIDUAL?

10 A I THINK HE WAS IN ONE OF THE BACK ROOMS, ROOM
11 NUMBER THREE, SIR, ALL THE WAY TO THE BACK.

12 Q AFTER YOU MADE THE ARREST OF HER, YOU
13 INDICATED TUAN NGUYEN ARRIVED AT THE BUSINESS; IS THAT
14 CORRECT?

15 A YES, SIR.

16 Q WHAT HAPPENED UPON HIS ARRIVAL?

17 A HE WALKED BY SERGEANT IBARRA, WHO WAS AT THE
18 DOORWAY, AND PROCEEDED TO WALK TOWARD MY LOCATION.

19 Q AND WHAT HAPPENED THEN?

20 A TUAN NGUYEN TOLD ME I COULD FOLLOW HIM TO THE
21 BACK OF THE LOCATION BECAUSE HE WANTED TO TALK TO ME.

22 Q DID YOU DO THAT?

23 A YES, SIR.

24 Q HE SPOKE WITH YOU IN ENGLISH?

25 A YES, SIR.

26 Q AND YOU SPOKE TO HIM IN ENGLISH I'M ASSUMING.

1 A YES, SIR.

2 Q WHAT HAPPENED AT THAT POINT?

3 A MR. TUAN NGUYEN PROCEEDED TO ONCE AGAIN TELL
4 ME TO GIVE HIM A BREAK, THAT HE WOULD MOVE HIS BUSINESS BY
5 TOMORROW. I TOLD MR. NGUYEN THAT I WAS TIRED OF THAT, AND
6 NO, HE WAS NOT GOING TO GET A BREAK.

7 Q WHAT HAPPENED THEN?

8 A MR. NGUYEN TOLD ME IF THE SERGEANT THAT WAS UP
9 BY THE DOORWAY, IF HE WAS OKAY. I SAID, "YES, HE'S OKAY."
10 AT THAT POINT HE SAID, "WHAT IS YOUR PARTNER'S NAME?"

11 I SAID, "TOLOSA."

12 AT THIS POINT HE TOLD ME, "I NEED YOUR HELP.
13 LAST WEEK TWO ENVELOPES WERE LEFT BEHIND IN MY PLACE." AND
14 AT THAT TIME HE TOOK THEM OUT OF HIS LEFT PANTS POCKET AND
15 HANDED TWO ENVELOPES TO ME. HE SAID, "TAKE IT WITH YOU TO
16 THE POLICE DEPARTMENT." AT WHICH POINT I OPENED THE
17 ENVELOPES AND NOTICED IT WAS \$500 IN EACH ENVELOPE, 100
18 DOLLAR BILLS. AT THAT POINT HE SAID, "NEXT TIME IT WILL BE
19 BETTER. BUSINESS IS SLOW RIGHT NOW."

20 Q WHAT HAPPENED THEN?

21 A AT THAT POINT, SEEING THAT IT WAS TWO
22 ENVELOPES, I CALLED DETECTIVE TOLOSA OVER TO MY LOCATION AND
23 WHERE TUAN NGUYEN AND I WERE TALKING.

24 Q WHAT HAPPENED THEN?

25 A I GAVE DETECTIVE TOLOSA THE ENVELOPE THAT
26 BELONGED TO HIM, AT WHICH POINT TUAN NGUYEN REPEATED THE SAME

1 STORY, THAT HE HAD FOUND THESE ENVELOPES AND WANTED US TO
2 HAVE THEM AND TAKE THEM TO THE POLICE DEPARTMENT, AND TOLD,
3 US, ONCE AGAIN, THAT BUSINESS WAS SLOW AND THAT IT WOULD BE
4 BETTER NEXT TIME. HE SAID THAT ON THREE DIFFERENT OCCASIONS.

5 Q DID YOU HAVE SOME CONVERSATION WITH MR. NGUYEN
6 AT THAT TIME ABOUT THE LADY WHO HAD BEEN ARRESTED?

7 A YES, SIR.

8 Q AND WHAT WAS THAT?

9 A I TOLD HIM THAT SERGEANT IBARRA WAS HERE
10 ALREADY, AND SHE HAD TO GO TO JAIL, BUT I WAS GOING TO SEE IF
11 I COULD CITE HER OUT WITH A CITATION, BUT SHE WAS STILL GOING
12 TO HAVE TO GO TO JAIL THAT DAY. AND MR. TUAN NGUYEN SAID,
13 "THAT'S FINE. THANK YOU."

14 Q AND DID YOU AND TOLOSA LEAVE THE BUSINESS?

15 A YES, SIR.

16 Q WITH THE \$1,000?

17 A YES, SIR.

18 Q WHAT WAS DONE WITH THAT MONEY?

19 A I BELIEVE DETECTIVE TOLOSA BOOKED THAT MONEY
20 INTO EVIDENCE.

21 Q FOLLOWING THAT INCIDENT, DID YOU CONTACT OR
22 SPEAK WITH A DEPUTY DISTRICT ATTORNEY IN ORANGE COUNTY
23 REGARDING WHAT HAD OCCURRED?

24 A YES, SIR.

25 Q DO YOU RECALL WHO THAT WAS?

26 A YES, SIR.

1 R.t. pp. 38-40

Reporter transcripts

1 R.t. pp. 38-40

Reporter transcripts

1 THE COURT: IF YOU WOULD ALL PASS YOUR TRANSCRIPTS TO
2 THE RIGHT, PLEASE, FOR COLLECTION.

3 MR. PEAR: WAS THE COURT ANTICIPATING A MORNING
4 BREAK, YOUR HONOR?

5 THE COURT: EVENTUALLY. WE'VE ONLY BEEN AT IT FOR 45
6 MINUTES.

7 Q BY MR. PEAR: DETECTIVE LIMA, FOLLOWING THE 12-7
8 INCIDENT, WAS THAT MONEY, THE THOUSAND DOLLARS BOOKED INTO
9 EVIDENCE AT THE POLICE DEPARTMENT, TOO?

10 A YES, SIR.

11 Q FROM THE PERIOD FROM DECEMBER 7 THROUGH
12 JANUARY 6 DID YOU RECEIVE SOME ADDITIONAL PHONE CALLS FROM
13 THE DEFENDANT, TUAN NGUYEN?

14 A YES, SIR.

15 Q ON JANUARY 7TH DID YOU ALSO HAVE A PHONE
16 CONVERSATION WITH HIM?

17 A THAT'S CORRECT.

18 Q WITH REGARDS TO THAT JANUARY 7TH CONVERSATION,
19 DO YOU RECALL THE SUBJECT MATTER OF THE CONVERSATION?

20 A I BELIEVE MR. TUAN NGUYEN HAD ASKED ME THAT --
21 HE HAD BEEN CALLING ME OVER THREE TIMES. HE WAS WONDERING IF
22 I WAS ON VACATION, WHERE I WAS AT, AND WE ALSO DISCUSSED THAT
23 IF HE WASN'T AT THE BUSINESS WHEN WE WENT BACK, THE MONEY
24 WOULD BE THERE FOR TOLOSA AND I.

25 Q ON JANUARY 25TH OF THIS YEAR, 2005, DID YOU
26 AND INVESTIGATOR TOLOSA RETURN TO THE HAPPY TANNING SALON ON

1 WEST 17TH IN SANTA ANA, ORANGE COUNTY?

2 A YES, SIR.

3 Q ON THAT DATE WAS THE CONTACT YOU HAD WITH THE
4 INDIVIDUALS THERE RECORDED SIMILAR TO THE RECORDING YOU MADE
5 OF THE DECEMBER 7TH --

6 A YES, SIR.

7 Q -- VISIT?

8 WHEN YOU ARRIVED AT THE LOCATION ON THE 25TH,
9 WAS TOLOSA WITH YOU AGAIN?

10 A THAT'S CORRECT.

11 Q WERE ANY OF THE DEFENDANTS PRESENT AT HAPPY
12 TANNING WHEN YOU ARRIVED?

13 A I BELIEVE AS WE ENTERED MR. TUAN NGUYEN WAS IN
14 THE SAME AREA, AND HE ENTERED ALMOST AT THE SAME TIME WE DID
15 AS WELL.

16 Q WHAT HAPPENED THEN?

17 A WE WENT -- HE TOOK US TO THE BACK ROOM, THE
18 FIRST ROOM WHEN YOU ENTER ON YOUR LEFT SIDE, AND HE PROCEEDED
19 TO GIVE US THE MONEY. HE GAVE THE ENVELOPES TO MYSELF AND
20 DETECTIVE TOLOSA.

21 Q WHEN YOU SAY HE GAVE YOU THE ENVELOPES, WERE
22 THERE TWO ENVELOPES?

23 A YES, SIR, THERE WERE TWO INDIVIDUAL ENVELOPES,
24 AND EACH ONE I BELIEVE HAD \$1,500 IN EACH, EACH ONE, HUNDRED
25 DOLLARS BILLS.

26 Q TO WHOM DID HE -- HE, TUAN NGUYEN, GIVE THE

1 ENVELOPES?

2 A I BELIEVE IT WAS ONE EACH TO ONE OF EACH,
3 TOLOSA AND MYSELF.

4 Q AND DID YOU HAVE SOME CONVERSATION WITH
5 MR. NGUYEN ON THAT DATE AT HAPPY TANNING?

6 A YES, SIR.

7 Q DO YOU RECALL THE SUBSTANCE OF IT?

8 A IT WAS REGARDING HIM WANTING FOR US TO TAKE
9 CARE OF HIS COMPETITION, OTHER MASSAGE PARLORS, PROSTITUTION
10 LOCATIONS IN ANAHEIM AND GARDEN GROVE AREA. I BELIEVE TOLOSA
11 OR MYSELF MIGHT HAVE ASKED HIM, "WHAT DO YOU WANT US TO DO
12 WITH THEM, SHOOT THEM?"

13 I THINK HIS RESPONSE MIGHT HAVE BEEN: "NO. I
14 JUST WANT YOU TO SCARE THEM."

15 MR. PEAR: I WOULD ASK TO HAVE MARKED AS PEOPLE'S TWO
16 FOR IDENTIFICATION AN EVIDENCE ENVELOPE CONTAINING A COMPACT
17 DISC RELATING TO THE JANUARY 25TH TRANSACTION.

18 THE COURT: SO MARKED.

19 MR. PEAR: I'LL SHOW IT TO COUNSEL. MAY I APPROACH
20 THE WITNESS?

21 THE COURT: YOU MAY.

22 Q BY MR. PEAR: DETECTIVE, SHOWING YOU WHAT'S BEEN
23 MARKED AS EXHIBIT TWO FOR IDENTIFICATION -- LET ME INTERRUPT
24 MYSELF AT THIS POINT AND MOVE THAT EXHIBIT ONE BE RECEIVED IN
25 EVIDENCE.

26 THE COURT: ANY OBJECTION?

1 R.t. pp. 64-79

Reporter transcripts

1 R.t. pp. 64-99

Reporter transcripts

1 ^CROSS-EXAMINATION

2 BY MR. PHAM:

3 Q GOOD AFTERNOON, DETECTIVE LIMA.

4 A YES, SIR.

5 Q HOW LONG HAD YOU BEEN DOING THE INVESTIGATION
6 OF THE TANNING SALON PRIOR TO MAKING THE FIRST ARREST OF THE
7 PEOPLE FROM THAT PARTICULAR PREMISES?8 THE COURT: I'M SORRY, ARE YOU ASKING ABOUT WHEN HE
9 ARRESTED ANY OF THE GIRLS OR WHEN HE ARRESTED EITHER OF THE
10 DEFENDANTS?11 MR. PHAM: THE FIRST ARREST OF ANYONE FROM THE
12 PREMISES, YOUR HONOR.13 THE WITNESS: THE INVESTIGATION OF HAPPY TANNING HAS
14 BEEN ONGOING SINCE 1997 OR '98. I WAS INVOLVED WITH MY FIRST
15 ARREST PERHAPS IN 2000 AND 1 SOMETIME.16 Q BY MR. PHAM: IS IT TRUE THAT BACK ON ABOUT
17 NOVEMBER 16TH THAT WAS THE FIRST TIME YOU HAD RECEIVED THE
18 MONEY FROM SOMEONE FROM THAT PARTICULAR PREMISES; IS THAT
19 CORRECT?

20 A I'M SORRY, CAN YOU REPEAT THE QUESTION.

21 Q IS IT TRUE THAT SOMEWHERE BETWEEN -- BEFORE
22 NOVEMBER OF 2000 AND 4TH THERE HAD NEVER BEEN ANY MONEY
23 EXCHANGED OR GIVEN TO YOU FROM ANYONE FROM THAT PARTICULAR
24 TANNING PREMISES; IS THAT CORRECT?

25 A THAT'S CORRECT.

26 Q YOU TESTIFIED EARLIER ON THAT WITHIN THE SPAN

1 OF ABOUT NINE MONTHS YOU MADE A TOTAL OF ABOUT 16 ARRESTS; IS
2 THAT CORRECT, SIR?

3 A WITHIN TEN MONTHS, 16 ARRESTS, THAT'S CORRECT.

4 Q CAN YOU TELL ME WHY YOU DID NOT CLOSE THAT
5 PLACE AFTER HAVING MADE 16 ARRESTS?

6 A I'M SORRY, SIR, CAN I TELL YOU WHAT?

7 Q WHY DIDN'T YOU REQUEST TO HAVE THAT PLACE
8 CLOSED DOWN AFTER YOU HAD MADE 16 ARRESTS?

9 A OH, WE'VE BEEN ATTEMPTING TO DO THAT, SIR,
10 SINCE 1997 VIA RED LIGHT ABATEMENT LETTERS TO THE OWNERS OF
11 THE BUSINESS OF HAPPY TANNING, SO IT'S BEEN GOING ON NONSTOP.

12 Q WHY DIDN'T YOU SEEK AN ORDER TO CLOSE DOWN
13 THAT PLACE AFTER YOU HAD MADE 16 ARRESTS? THAT IS MY
14 QUESTION.

15 A I'M NOT A LAWYER. THAT'S THE CITY ATTORNEY'S
16 JOB. LIKE I SAID, WE SENT MANY, MANY LETTERS TO OWNERS OF
17 THE HAPPY TANNING AND THE ACTUAL PROPERTY OWNER REGARDING RED
18 LIGHT ABATEMENT IF IT CONTINUED. LIKE I SAID, THAT HAPPENED
19 MANY, MANY TIMES SINCE 1997 TO THIS DATE.

20 Q AFTER YOU MADE THOSE ARRESTS -- DID YOU HAVE
21 ANY WARRANT PRIOR TO ENTERING THE SUBJECT PREMISES TO MAKE
22 ARRESTS?

23 MR. PEAR: OBJECTION; RELEVANCE.

24 THE COURT: SUSTAINED.

25 Q BY MR. PHAM: DETECTIVE LIMA, DID YOU MAKE A REPORT
26 BACK ON OR ABOUT MARCH -- MARCH 30TH OF THIS YEAR? IT

1 CONSIST OF SEVEN PAGES PERTAINING TO THE ACTIVITIES GOING ON
2 AT THE PREMISES FROM ABOUT 19 -- FROM ABOUT OCTOBER -- STRIKE
3 THAT. FROM NOVEMBER 16 THROUGH MARCH 10?

4 A I'M SORRY, SIR, YOU LOST ME A LITTLE BIT. IF
5 I CAN ANSWER SOME OF YOUR QUESTION YES, I DID MAKE A REPORT
6 REGARDING THE INCIDENTS FROM NOVEMBER TO MARCH 10TH.

7 MR. PHAM: MAY I APPROACH THE WITNESS TO SHOW HIM THE
8 ACTUAL REPORT TO MAKE SURE WE ARE TALKING ABOUT THE SAME
9 REPORT HERE, YOUR HONOR?

10 THE COURT: YES.

11 THE WITNESS: YES.

12 Q BY MR. PHAM: DO YOU SPEAK VIETNAMESE?

13 A NO, SIR.

14 Q DO YOU UNDERSTAND VIETNAMESE?

15 A NO, SIR.

16 Q DO YOU HAPPEN TO HAVE WITHIN YOUR POSSESSION
17 AT THIS TIME A COPY OF THE POLICE REPORT THAT I SHOWED TO
18 YOU?

19 A YES, SIR.

20 Q I WOULD LIKE TO POINT YOUR ATTENTION TO PAGE
21 NUMBER SIX, PLEASE.

22 THE WITNESS: MAY I, YOUR HONOR?

23 THE COURT: YES.

24 THE WITNESS: OKAY, SIR.

25 Q BY MR. PHAM: ON THE FIFTH PARAGRAPH STARTING ON
26 THE THIRD LINE, COULD YOU PLEASE READ TO THE -- OUT LOUD SO

1 THAT WE CAN ALL HEAR STARTING FROM THE WORD "I. " I CALLED
2 SUSPECT NUMBER TWO, MR. NGUYEN." COULD YOU, PLEASE,
3 DETECTIVE LIMA.

4 A YES, SIR. HOW FAR DO YOU WANT ME TO READ INTO
5 IT?

6 Q JUST FROM THE THIRD LINE I HAD JUST INSTRUCTED
7 TO THE END OF THE PARAGRAPH.

8 A YES, SIR. "I CALLED SUSPECT NUMBER TWO,
9 NGUYEN, OVER TO HAU, AND HAU TOLD HER IN VIETNAMESE, 'I PUT
10 THAT THERE, AND HE DID NOT WANT TO TAKE IT.' AFTER LOOKING
11 INSIDE THE ENVELOPE, INVESTIGATOR TOLOSA AND I COUNTED A
12 TOTAL OF \$2,000. SUSPECT NUMBER TWO, NGUYEN, MADE ANOTHER
13 PHONE CALL, AND THEY SAID THEY HAD FORGOTTEN ANOTHER
14 ENVELOPE."

15 Q SO MR. -- IS THAT MR. NGUYEN OR MISS NGUYEN?

16 A UH, THAT'S MRS. NGUYEN.

17 Q MRS. NGUYEN. IS THAT RIGHT, MRS. NGUYEN?

18 A THAT'S CORRECT, SIR.

19 Q AND HOW IN VIETNAMESE, QUOTE, UNQUOTE, "I PUT
20 THAT THERE, AND HE DIDN'T WANT TO TAKE IT"?

21 A THAT'S CORRECT. THAT'S WHAT HE SAID.

22 Q HE SAID THAT IN ENGLISH?

23 A NO, NO. IN VIETNAMESE, SIR.

24 Q DID YOU HAVE SOMEONE DO THE TRANSLATION FOR
25 YOU AT THAT TIME?

26 A YES, SIR. A COURT CERTIFIED PERSON BY THE

1 NAME OF DAT NGUYEN THAT WORKS IN OUR AGENCY, HE TRANSLATED
2 THAT FOR ME.

3 Q SO MR. HAU SPOKE IN VIETNAMESE AT THE
4 PREMISES, AND THEN YOU -- I WONDER HOW -- WAS THE TRANSLATOR
5 THERE AT THAT TIME ON THE PREMISES AND DO THE TRANSLATION FOR
6 YOU RIGHT THERE AND THEN?

7 A NO, SIR. YOU RECALL THE TAPES THAT WERE
8 PLAYED EARLIER. I HAVE THOSE TAPES. I PLAYED THAT TO THE
9 COURT CERTIFIED TRANSLATOR, WHO LISTENED TO THEM AT A LATER
10 TIME.

11 Q IS IT TRUE THAT YOU INDICATE THAT YOU HAVE
12 SEEN MR. HAU ON THE PREMISES ON NUMEROUS OCCASIONS?

13 A FROM WHICH TIME, SIR?

14 Q CAN YOU TELL ME, SIR, HOW MANY TIMES HAVE YOU
15 ACTUALLY SEEN MR. -- STRIKE THAT.

16 HOW MANY TIMES HAVE YOU ACTUALLY SPOKEN TO
17 MR. HAU?

18 A SEVERAL TIMES, SIR.

19 Q WAS THAT JUST BASICALLY INVOLVED GREETINGS,
20 SUCH AS "HELLO, HOW ARE YOU DOING?" ANYTHING BESIDES THAT
21 NORMAL GREETING?

22 A YES, SIR. I SPOKE WITH HIM AS FAR BACK AS
23 MARCH OF 2004 WHEN HE TOLD ME HE WAS RUNNING THE BUSINESS, TO
24 JUST SIMPLE "HELLOS," TO "I'M GONNA CALL TONY FOR YOU, DON'T
25 WORRY." TO "HERE'S THE MONEY. THERE'S TWO IN HERE, AND
26 THERE'S TWO MORE NEXT TIME."

1 Q DO YOU KNOW MR. HAU'S CAPACITY AT THE TANNING
2 SALON?

3 A DO I KNOW HIS WHAT? I'M SORRY, SIR?

4 Q HIS POSITION THERE.

5 A I WOULD CONSIDER -- ARE YOU ASKING ME OR DO I
6 KNOW?

7 Q DO YOU KNOW?

8 A I BELIEVE HE'S THE MANAGER, SIR. HE RUNS THE
9 BUSINESS ALONG WITH MR. TUAN NGUYEN.

10 Q WHEN YOU SAY HE RUNS THE BUSINESS, IS HE
11 EMPLOYED THERE, OR HE ACTUALLY IS THE OWNER OR THE PERSON
12 THAT RUNS THE PLACE? CAN YOU CLARIFY THAT?

13 A YES. MR. TUAN NGUYEN AND MR. HAU HAVE BEEN IN
14 BUSINESS RUNNING THIS PLACE FOR A VERY LONG TIME. THERE IS
15 ACTUALLY NO EMPLOYEE PEOPLE WORKING THERE. AND I FOUND THIS
16 OUT THROUGH I BELIEVE THE EQUAL OPPORTUNITY EMPLOYMENT. THEY
17 TOLD ME THAT THERE'S NO ONE THAT ACTUALLY IS WORKING THERE,
18 SO THAT'S WHY I KNOW THAT.

19 Q BESIDES THE INFORMATION YOU HAD JUST PROVIDED,
20 DO YOU KNOW WHETHER OR NOT MR. HAU ACTUALLY IS EMPLOYED THERE
21 OR HE IS THE EMPLOYER OR HE IS THE EMPLOYEE AT THAT
22 PARTICULAR PLACE, INDEPENDENTLY?

23 A I'M SORRY, SIR, CAN YOU REPEAT THAT AGAIN?

24 Q INDEPENDENTLY DO YOU KNOW WHAT MR. HAU'S
25 ACTUAL CAPACITY IS AT THAT PARTICULAR PLACE?

26 A HE'S RUNNING THE PLACE JUST LIKE MR. TUAN

1 NGUYEN IS, SIR.

2 Q AND BASED ON WHAT INFORMATION?

3 A THE INFORMATION THAT WE'VE DONE SURVEILLANCES
4 ON HIM, DRIVING THE GIRLS FROM THE PLACE TO ANOTHER LOCATION.
5 HE PICKS UP FOOD FOR THE GIRLS. HE'S ALWAYS THERE THE
6 MAJORITY OF THE TIMES THAT WE SHOW UP, AND HE ALSO COLLECTS
7 MONEY FOR THE GIRLS WHEN CUSTOMERS COME IN.

8 Q WERE YOU THERE WHEN HE COLLECTED MONEY FOR THE
9 GIRLS?

10 A YES, SIR. I WALKED IN SHORTLY THEREAFTER.

11 Q DOES HE APPEAR TO BE RUNNING THE PLACE OR HE
12 IS ACTUALLY DOING IT AT THE COMMAND OF A THIRD PARTY?

13 A NO. I THINK TUAN NGUYEN AND HAU ARE BOTH
14 RUNNING THE PLACE. I DON'T THINK ANYBODY IS COMMANDING
15 ANYBODY TO DO ANYTHING.

16 Q YOUR TESTIMONY EARLY ON THAT AFTER -- STRIKE
17 THAT.

18 DO YOU RECALL HAVING STATED THAT AFTER -- ON
19 ONE OCCASION AFTER HAVING SPOKEN TO MRS. NGUYEN, AND THEN YOU
20 INDICATED THAT MRS. NGUYEN THEN MADE A PHONE CALL, AND THEN A
21 FEW MINUTES LATER MR. HAU APPEARED, DO YOU RECALL THAT?

22 A WHICH TIME, SIR?

23 Q DO YOU RECALL THE TIME WHEN -- WAS THERE MORE
24 THAN ONE OCCASION WHEN, AFTER MRS. NGUYEN MADE A PHONE CALL,
25 THAT MR. HAU APPEARED AND TALKED TO YOU? WAS THAT ON MORE
26 THAN ONE OCCASION?

1 A I DON'T RECALL, SIR. I'M WONDERING WHICH
2 TIME. THERE'S DIFFERENT DATES AND TIMES, SO IF YOU COULD
3 NARROW IT DOWN A LITTLE BIT FOR ME, SIR.

4 Q DO YOU RECALL HAVING TESTIFIED AT ONE TIME YOU
5 SAW MR. HAU CAME IN A FEW MINUTES LATER THROUGH THE BACK
6 DOOR, AND YOU FOLLOW HIM, DO YOU RECALL THAT?

7 A IS THAT THE TIME HE GAVE ME THE MONEY, SIR?
8 ON MARCH 10TH?

9 Q THAT WOULD BE ON THE OCCASION OF MARCH 10TH,
10 THAT IS CORRECT.

11 A YES, I RECALL THAT.

12 Q SO IS IT TRUE THAT YOU TESTIFIED EARLY ON WHEN
13 YOU WENT TO THAT PARTICULAR HAPPY TANNING AND YOU FOUND
14 MRS. -- AND YOU FOUND MRS. NGUYEN ASLEEP ON THE FLOOR, YOU
15 WOKE HER UP, AND THEN SHE MAKE A PHONE CALL, DO YOU REMEMBER
16 THAT?

17 A YES, SIR.

18 Q AND THEN ACCORDING TO YOU AS WELL
19 SUBSEQUENTLY -- OR A FEW MINUTES LATER MR. HAU SHOWED UP; IS
20 THAT CORRECT?

21 A THAT'S CORRECT.

22 Q DO YOU KNOW WHETHER OR NOT TO WHOM THE PHONE
23 CALL WAS MADE BY MRS. NGUYEN AT THAT TIME?

24 A NO, SIR.

25 Q WAS THERE ANY ONE PARTICULAR TIME THAT MR. HAU
26 ACTUALLY HANDED MONEY TO YOU?

1 A YES, SIR. LIKE I STATED, HE HANDED ME THE
2 MONEY ON MARCH THE 10TH. WHEN HE CAME BACK THE SECOND TIME,
3 HE HANDED ME THE ENVELOPE THAT CONTAINED \$2,000, AND THAT'S
4 WHEN HE SAID, "HERE'S TWO MORE. TWO MORE NEXT TIME," OR
5 SOMETHING TO THAT EFFECT.

6 Q DID HE ASK YOU -- IN EXCHANGE FOR THE MONEY,
7 DID HE ASK YOU NOT TO EVER RETURN OR NOT TO BOTHER THE GIRLS
8 THERE AT THE TANNING SALON?

9 A NO, SIR.

10 Q DID HE -- STRIKE THAT.

11 AT THE TIME WHEN HE, ACCORDING TO YOU, HANDED
12 YOU THE CHECK -- I MEAN, THE ENVELOPE CONTAINING THE 2000,
13 DID HE TELL YOU THAT THE MONEY WAS BEING GIVEN TO YOU SO THAT
14 YOU WOULD NOT BE MAKING ANY MORE ARRESTS OF THE GIRLS THERE?

15 A CAN YOU REPEAT THE QUESTION.

16 Q WHEN HE ALLEGEDLY HANDED YOU AN ENVELOPE
17 CONTAINING \$2,000 INSIDE THE ENVELOPE, DID HE ASK YOU TO NOT
18 MAKE ANY MORE ARRESTS OF THE GIRLS AT THE SUBJECT PREMISES?

19 A NO, SIR. HE JUST SAID, "HERE'S TWO MORE,"
20 MEANING \$2,000, AND "THERE WILL BE TWO MORE NEXT TIME."

21 MR. PHAM: MOVE TO STRIKE THE REMAINING, ANYTHING
22 AFTER THE WORD "NO," YOUR HONOR.

23 THE COURT: "NO" WILL REMAIN. EVERYTHING ELSE WILL
24 BE STRICKEN. THE JURY IS ORDERED TO DISREGARD IT.

25 Q BY MR. PHAM: DID MR. HAU AT THE TIME WHEN HE
26 ALLEGEDLY HANDED YOU \$2,000 IN AN ENVELOPE, DID HE ASK YOU

1 NOT TO BOTHER THEM AND TO FURTHER PROVIDE PROTECTION FOR
2 THEM?

3 A NO, SIR.

4 Q DID MR. HAU EVER MAKE ANY PHONE CALL TO YOU
5 THROUGHOUT 2004, 2005?

6 A DID HE EVER CALL ME?

7 Q THAT WAS THE QUESTION, SIR.

8 A NO, SIR.

9 Q EVERY TIME WHEN YOU MADE THE VISIT TO THE
10 HAPPY TANNING OR TANNING SALON, IS IT TRUE THAT THE ONE THAT
11 YOU WANT TO TALK TO IS ALWAYS SOMEONE DIFFERENT OR SOMEONE
12 OTHER THAN MR. HAU; IS THAT CORRECT?

13 A YES, SIR, I BELIEVE SO.

14 Q HOW IS MR. HAU'S ENGLISH?

15 A I DON'T UNDERSTAND YOUR QUESTION, SIR.

16 Q HOW'S HIS ENGLISH COMPARED TO -- THE FLUENCY?

17 A I CAN'T READILY GRADE IT. I CAN COMMUNICATE
18 WITH HIM, IF THAT'S WHAT YOU'RE ASKING.

19 Q ON THOSE OCCASIONS THAT YOU HAVE ACTUALLY
20 SPOKEN TO MR. HAU, WAS THERE ANY ONE TIME MR. HAU DISCUSS --
21 DISCUSS WITH YOU ABOUT THE PROSPECT OF -- ABOUT THE ISSUE OF
22 GIVING YOU MONEY SO THAT YOU MAY PROVIDE EITHER PROTECTION
23 FOR THEM OR THAT YOU MAY STOP MAKING ARRESTS OF THE GIRLS?
24 ANY OF THOSE ISSUES DISCUSSED BETWEEN YOU AND MR. HAU?

25 A NO, SIR.

26 Q DID MR. HAU EVER TAKE THE INITIATIVE OF JUST

1 HANDING OVER THE MONEY TO YOU WHEN YOU GREETED HIM ON ALL OF
2 THOSE OCCASIONS?

3 A I WOULD SAY THE LAST TIME, SIR, HE CAME,
4 OPENED THE DOOR TO THE BUSINESS WHEN HE CAME IN THE SECOND
5 TIME AND JUST HANDED ME THE MONEY AND SAID, "HERE'S TWO, AND
6 THE NEXT TIME IT WILL BE BETTER. IT WILL BE TWO MORE."
7 NOBODY WAS THERE TELLING HIM TO COME TO ME, SO --

8 Q AND THAT TIME HOW LONG WAS -- THE TIME THAT
9 YOU SAID THAT HE HANDED THE MONEY TO YOU, HOW FAR WAS -- DID
10 THE TIME ELAPSE THE FIRST TIME WHEN HE GAVE THE 2000 TO YOU,
11 WHICH, ACCORDING TO YOU, HE LEFT ON THE TABLE STAND -- THE
12 NIGHTSTAND, BETWEEN THAT TIME AND THE PERIOD YOU SAID HE
13 REENTERED THE ROOM AND HANDED YOU \$2,000, WHAT IS THE TIME
14 FRAME?

15 A I WOULD SAY ABOUT 20 MINUTES.

16 Q SO THE FIRST THING THAT HAPPENED WHEN HE DID
17 THAT AT THE INSTRUCTION OF A THIRD PARTY AND THEN 20 MINUTES
18 LATER HE JUST CAME AND HANDED YOU THE SECOND ENVELOPE; IS
19 THAT CORRECT?

20 A CAN YOU REPEAT THAT AGAIN.

21 Q THE FIRST TIME HE DID NOT TAKE THE INITIATIVE.
22 HE WAS CALLED IN TO HAND YOU OR TO HAND OVER THE ENVELOPE AND
23 PUT ON THE TABLE OR THE NIGHTSTAND, AND THEN 20 MINUTES
24 LATER, THAT WAS THE FIRST TIME WHEN HE REENTERED THE
25 BUILDING, HE CONTINUED -- HE HANDED YOU ANOTHER ENVELOPE FOR
26 2000; IS THAT CORRECT?

1 MR. PEAR: OBJECTION; ASSUMES FACTS NOT IN EVIDENCE.

2 THE COURT: SUSTAINED.

3 Q BY MR. PHAM: IS IT TRUE THAT THE FIRST TIME THAT
4 HE -- ACCORDING TO YOU, THAT HE HANDED YOU THE MONEY WITHOUT
5 DIRECT INSTRUCTION FROM ANYONE WAS THE LAST TIME THAT HE
6 HANDED YOU \$2,000; IS THAT CORRECT?

7 MR. PEAR: OBJECTION; CALLS FOR A CONCLUSION.

8 THE COURT: SUSTAINED.

9 MR. PEAR: AND NO FOUNDATION.

10 MR. PHAM: YOUR HONOR, I JUST WANT TO VERIFY THE
11 WITNESS' LAST TIME, YOUR HONOR.

12 THE COURT: YOU'RE ASKING HIM IN HIS OPINION IF
13 SOMEBODY GAVE HIM DIRECTION TO GIVE HIM THE MONEY, AND I
14 DON'T THINK THIS WITNESS IS QUALIFIED TO MAKE THAT
15 PROGNOSTICATION.

16 Q BY MR. PHAM: IS IT TRUE THAT, ACCORDING TO YOU,
17 THE ONLY ONE TIME, TO YOUR KNOWLEDGE, THAT MR. HAU MADE THE
18 INITIATIVE OF HANDING OVER THE MONEY TO YOU WAS THE VERY LAST
19 TIME; IS THAT CORRECT?

20 A THE VERY LAST TIME ON MARCH 10, SIR?

21 Q DID MR. HAU HAND YOU SOME OTHER -- SOME MORE
22 MONEY AFTER THAT DATE?

23 A NO. I'M JUST TRYING TO CLARIFY EXACTLY WHAT
24 WE'RE TALKING ABOUT. THAT WAS -- THE SECOND TIME WAS THE
25 LAST TIME, YES.

26 Q AND THE TIME THAT HAPPENED BEFORE, THAT WAS

1 JUST ABOUT 20 MINUTES BEFORE THE VERY LAST TIME; IS THAT
2 CORRECT, SIR?

3 A THAT'S CORRECT. WHERE HE WALKED INTO THE
4 LOCATION AND TOOK MONEY OUT OF HIS WAISTBAND, REAR WAISTBAND
5 AREA, YES, SIR.

6 Q AND AT THAT TIME HE WAS CALLED BY A THIRD
7 PARTY THAT YOU SAW; IS THAT CORRECT, SIR?

8 MR. PEAR: OBJECTION; NO FOUNDATION.

9 THE COURT: SUSTAINED.

10 Q BY MR. PHAM: SO PRIOR TO THE VERY LAST TIME,
11 ACCORDING TO YOU -- I JUST WANT TO HAVE SOME CLARIFICATION
12 WHETHER, AGAIN, WHEN YOU WENT ON MARCH 10 OF 2000 AND 5 ONTO
13 THE PREMISES, YOU FOUND MRS. NGUYEN ASLEEP ON THE FLOOR; IS
14 THAT CORRECT?

15 A THAT'S CORRECT.

16 Q AND THEN -- DID YOU SEE MR. HAU AT THAT TIME
17 WHEN YOU FIRST ENTERED THE SUBJECT BUILDING?

18 A I DON'T BELIEVE SO.

19 Q WAS HE INSIDE THE SUBJECT BUILDING?

20 A I DON'T BELIEVE SO, BUT IF I CAN LOOK IN MY
21 REPORT, I COULD REFRESH MY MEMORY.

22 Q YOU MAY, SIR.

23 THE COURT: GO AHEAD.

24 THE WITNESS: OKAY, SIR.

25 Q BY MR. PHAM: UPON YOUR ENTRY OF THE SUBJECT
26 BUILDING, BESIDES HAVING SEEN MRS. NGUYEN RESTING ON THE

1 FLOOR, DID YOU SEE MR. HAU ON THE PREMISES AT THAT TIME?

2 A NO, SIR.

3 Q AND THEN IS IT TRUE THAT AT THAT TIME YOU WOKE
4 MRS. NGUYEN UP AND THEN SHE MAKES A PHONE CALL; IS THAT
5 CORRECT?

6 A THAT'S CORRECT.

7 Q AND THEN A FEW MINUTES LATER AFTER THE PHONE
8 CALL WAS MADE THEN YOU SAW MR. HAU COMING -- COMING ONTO THE
9 PREMISES; IS THAT CORRECT?

10 A THAT'S CORRECT.

11 Q AND THEN WITHIN SHORTLY THEREAFTER MR. HAU,
12 ACCORDING TO YOUR WORDS -- AND IF I'M WRONG PLEASE CORRECT
13 ME -- PUT THE MONEY ON -- ON THE NIGHTSTAND; IS THAT CORRECT?

14 A YES, SIR. HE TOOK IT OUT OF HIS REAR
15 WAISTBAND AREA, AND HE STARTED TO PUT IT IN THE NIGHTSTAND
16 AREA WHEN I SURPRISED HIM.

17 Q ALL RIGHT. AND THEN 20 MINUTES LATER --
18 STRIKE THAT.

19 AFTER THAT DID YOU SEE HIM LEAVING THE
20 PREMISES?

21 A UH, HE STAYED AROUND FOR A FEW MINUTES.

22 Q BUT THEN HE LEFT THE PREMISES; IS THAT
23 CORRECT?

24 A THAT'S CORRECT.

25 Q AND THEN ABOUT 15 TO 20 MINUTES LATER HE
26 RETURNED?

1 A THAT'S CORRECT.

2 Q AND THAT'S THE TIME WHEN -- ACCORDING TO YOU,
3 THAT WAS THE FIRST TIME HE EVER HANDED YOU THE MONEY
4 DIRECTLY; IS THAT CORRECT?

5 A THAT'S CORRECT.

6 Q DID YOU EVER CHECK THE -- DID YOU CHECK OR
7 VERIFY THE LICENSE FOR OPERATION OF THE HAPPY TANNING ON YOUR
8 VARIOUS VISITS TO THE PLACE?

9 A YES, SIR.

10 Q DID YOU HAPPEN TO SEE THE OWNER OF THE SUBJECT
11 PREMISES?

12 A WHICH TIME, SIR? THEY WERE ALWAYS CHANGING
13 IT.

14 Q LET'S SAY ABOUT BETWEEN OCTOBER OF 2000 AND 4
15 AND MAY OF 2000 AND 5.

16 A I DON'T RECALL. HOWEVER, I CAN TELL YOU THAT
17 IT WAS CHANGED ON THREE DIFFERENT DATES, THREE DIFFERENT
18 OWNERS. THE LAST PERSON WAS JANUARY -- AT THE END OF JANUARY
19 I BELIEVE THE NAME OF TAMMY TRAN, BUT THERE WAS TWO OTHER
20 PEOPLE BETWEEN OCTOBER AND THAT TIME.

21 Q WOULD YOU TELL ME THE NAME.

22 A I DON'T RECALL, SIR.

23 Q DID ANY OF THOSE NAMES APPEAR TO BE MR. HAU?

24 A MR. HAU? NO, SIR.

25 MR. PHAM: NO FURTHER QUESTIONS, YOUR HONOR.

26 THE COURT: MR. BARILLA.

1 MR. BARILLA: YES, YOUR HONOR. THANK YOU VERY MUCH.

2 ^CROSS-EXAMINATION

3 BY MR. BARILLA:

4 Q GOOD AFTERNOON, OFFICER LIMA.

5 A GOOD AFTERNOON.

6 Q OFFICER LIMA, WHEN YOU FIRST TESTIFIED, YOU
7 SAID THAT PRIOR TO THE NOVEMBER 16TH TIME THAT YOU WENT
8 THERE, THERE WERE HOW MANY ARRESTS MADE OUT OF THAT
9 ESTABLISHMENT?

10 A NUMEROUS, SIR. HOWEVER, TEN MONTHS PRIOR TO
11 THAT INCIDENT 16 ARRESTS HAD BEEN MADE.

12 Q OKAY. WERE YOU INVOLVED WITH THOSE ARRESTS?

13 A I WOULD SAY THE MAJORITY OF THEM, YES, SIR,
14 WHETHER IN ASSISTING OR SUPERVISING OR, YOU KNOW, BUT I WAS
15 ALWAYS THERE PRESENT.

16 Q WERE THOSE ARRESTS MADE BY A WARRANT?

17 MR. PEAR: OBJECTION; IRRELEVANT.

18 THE COURT: SUSTAINED.

19 Q BY MR. BARILLA: WHEN YOU MADE THOSE ARRESTS, WERE
20 YOU ACTUALLY -- DID YOU ACTUALLY GO IN AND WERE PART OF AN
21 UNDERCOVER OPERATION WHERE YOU SAW THE ACTIVITY WHERE SOME OF
22 THE GIRLS MAY HAVE APPROACHED YOU REGARDING SOME PROSTITUTION
23 ACTIVITY?

24 A NOT ME, SIR.

25 Q SO YOU WENT IN BASED ON SOME OTHER UNDERCOVER
26 OFFICER SAYING THIS TOOK PLACE, AND YOU WENT IN ON THE

~~REPORTER TRANSCRIPTS pp. 111, 126~~

~~REPORTER TRANSCRIPTS pp. 111, 126~~

1 A I EVENTUALLY HAD A MEETING WITH MY SUPERVISOR,
2 ED CONTRERAS, SUPERVISOR JEFF MC LAUGHLIN, INVESTIGATOR RANDY
3 LITWIN FROM MY UNIT, AND INVESTIGATOR LONG NGUYEN.

4 Q THAT WAS THE INVESTIGATOR WHO JUST LEFT THE
5 COURTROOM --

6 A THAT'S CORRECT.

7 Q -- AS YOU CAME IN?

8 AND WERE YOU APPRISED OF SOME INFORMATION OF
9 ALLEGATIONS MADE BY TUAN NGUYEN REGARDING DAVID LIMA?

10 A YES, I WAS.

11 Q WAS THAT MEETING HELD ON MARCH THE 9TH?

12 A UM --

13 Q THE MEETING WITH YOUR SUPERVISOR AND LONG
14 NGUYEN.

15 A I'D HAVE TO REFER TO MY NOTES. I CAN'T
16 REMEMBER IF IT WAS THE 9TH OR THE 10TH.

17 Q FOLLOWING THE MEETING, WHAT DID YOU DO?

18 A FOLLOWING THE MEETING, INVESTIGATOR LONG
19 NGUYEN AND RANDY LITWIN WENT TO GO TO MR. NGUYEN'S RESIDENCE
20 TO PICK HIM UP, AND I PREPARED AN INTERVIEW ROOM TO CONDUCT
21 AN INTERVIEW.

22 Q DO YOU RECOGNIZE TUAN NGUYEN HERE IN COURT
23 TODAY?

24 A YES, I DO.

25 Q WOULD YOU IDENTIFY HIM FOR THE RECORD.

26 A HE'S THE GENTLEMAN AT THE TABLE HERE IN THE

1 COPY OF THE INSTRUCTIONS IN THE JURY ROOM FOR DELIBERATIONS.

2 MEMBERS OF THE JURY, YOU HAVE HEARD ALL THE
3 EVIDENCE AND NOW IT IS MY DUTY TO INSTRUCT YOU ON THE LAW
4 THAT APPLIES TO THIS CASE. THE LAW REQUIRES THAT I READ THE
5 INSTRUCTIONS TO YOU. YOU WILL HAVE THESE INSTRUCTIONS IN
6 WRITTEN FORM IN THE JURY ROOM TO REFER TO DURING YOUR
7 DELIBERATIONS.

8 YOU MUST BASE YOUR DECISION ON THE FACTS AND
9 THE LAW. YOU HAVE TWO DUTIES TO PERFORM. FIRST , YOU MUST
10 DETERMINE WHAT FACTS HAVE BEEN PROVED FROM THE EVIDENCE
11 RECEIVED IN THE TRIAL AND NOT FROM ANY OTHER SOURCE. A FACT
12 IS SOMETHING PROVED BY THE EVIDENCE. SECOND, YOU MUST APPLY
13 THE LAW THAT I STATE TO YOU TO THE FACTS, AS YOU DETERMINE
14 THEM, AND IN THIS WAY ARRIVE AT YOUR VERDICT AND ANY FINDING
15 YOU ARE INSTRUCTED TO INCLUDE IN YOUR VERDICT. NEVER MIND.
16 NO FINDINGS. LET ME READ THAT AGAIN.

17 SECOND, YOU MUST APPLY THE LAW THAT I STATE TO
18 YOU TO THE FACTS, AS YOU DETERMINE THEM, AND IN THIS WAY
19 ARRIVE AT YOUR VERDICT.

20 YOU MUST ACCEPT AND FOLLOW THE LAW AS I STATE
21 IT TO YOU REGARDLESS OF WHETHER YOU AGREE WITH IT. IF
22 ANYTHING CONCERNING THE LAW SAID BY THE ATTORNEYS IN THEIR
23 ARGUMENTS OR AT ANY OTHER TIME DURING THE TRIAL CONFLICTS
24 WITH MY INSTRUCTIONS ON THE LAW, YOU MUST FOLLOW MY
25 INSTRUCTIONS.

26 YOU MUST NOT BE INFLUENCED BY PITY FOR OR

R.t. pp. 2D2 - 2D4

REPORTER transcripts

R.t. pp. 2D2 - 2D4

REPORTER transcripts

1 SO WITHOUT THAT EVIDENCE, THERE'S A
2 SUBSTANTIAL LIKELIHOOD THAT THE OUTCOME WOULD HAVE BEEN
3 DIFFERENT. AND THERE'S NO QUESTION THAT AS A MATTER OF
4 LAW, IT'S DEFICIENT PERFORMANCE NOT TO RUN A MERITORIOUS
5 MOTION TO SUPPRESS EVIDENCE.

6 SO, BASED UPON THOSE COMMENTS AND ANY
7 QUESTIONS OF THE COURT, I'M PREPARED TO SUBMIT.

8 THE COURT: MR. PEAR.

9 MR. PEAR: YES. JUST BRIEFLY, YOUR HONOR, AS TO
10 THE LATTER ISSUE ON THE MOTION TO SUPPRESS.

11 THE PEOPLE'S THEORY IS THAT THE MOTION TO
12 SUPPRESS, EVEN IF RUN AND EVEN IF GRANTED AS TO THOSE
13 THINGS THAT COUNSEL SUBMITTED, SHOULD HAVE BEEN
14 SUPPRESSED. IT WOULD NOT HAVE HAD ANY IMPACT ON THE
15 TRIAL OR THE RESULT OF THE TRIAL AT ALL BECAUSE AS
16 COUNSEL SEEMS TO CONCEDE, THEY'RE NOT INTERESTED IN THE
17 ARRESTS OF THESE THIRD PARTY EMPLOYEES, BUT THOSE ARE
18 THE VERY BASES OF BRIBES.

19 SO, OUR POSITION ON THE CASE IS THE DEFENDANT
20 STILL WOULD HAVE BEEN IN THIS SITUATION IF THE POLICE
21 OFFICER ARRESTED THIS PERSON FOR PROSTITUTION. THE
22 DEFENDANT PAID THE MONEY TO GIVE THESE GIRL'S A BREAK.

23 AS TO THE FIRST ISSUE ON THE PITCHESS MOTION,
24 I'LL SUBMIT ON THE ARGUMENT I MADE IN THE BRIEF.

25 THE COURT: THE COURT'S RULINGS ARE PRIMARILY BASED
26 ON STRICKLAND V. WASHINGTON, WHICH IS AT 466 U.S. 668.

1 "AND RULING ON A MOTION FOR NEW TRIAL, THE DEFENDANT
2 MUST SHOW THAT THERE IS A REASONABLE PROBABILITY ABSENT
3 OR BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT
4 OF PROCEEDING WOULD HAVE BEEN DIFFERENT WHEN A DEFENDANT
5 CHALLENGES A CONVICTION. THE QUESTION IS, WHETHER THERE
6 IS A REASONABLE PROBABILITY THAT ABSENT THE ERRORS, THE
7 FACT FINDER WOULD HAVE HAD A REASONABLE DOUBT SUSPECTING
8 GUILT."

9 I THINK IT'S PRETTY OBVIOUS THAT NONE OF US
10 HAVE BEEN ABLE TO FIND ANY CASE LAW SPECIFICALLY ON
11 POINT WITH REGARD TO THE QUESTION OF A PITCHESS MOTION
12 POST TRIAL AS TO EXACTLY WHAT STANDARD IS TO BE APPLIED.

13 AND I DISAGREE WITH MS. ERICKSON THAT IS
14 COMPLYING WITH THE STANDARD FOR PITCHESS. AND IT WAS
15 REFRESHING TO SEE THAT YOU DID PICK UP ON THE COURT'S
16 RULING.

17 I DID FIND THAT THERE WAS MATERIAL THAT WOULD
18 HAVE BEEN DISCLOSED PRIOR TO TRIAL, BUT LOOKING BACK IN
19 RETROSPECT AFTER TRIAL, IT'S THE COURT'S CONCLUSION THAT
20 THAT EVIDENCE WAS OF SUCH LITTLE PROBATIVE VALUE THAT
21 NUMBER ONE, IT PROBABLY WOULD NOT HAVE BEEN ADMITTED TO
22 BEGIN WITH, BUT SECOND OF ALL, IT WOULD NOT HAVE MADE A
23 DIFFERENCE IN THE OUTCOME OF THIS TRIAL. IT WOULD NOT
24 HAVE RAISED A REASONABLE DOUBT CONCERNING THAT
25 PARTICULAR OFFICER'S TESTIMONY.

26 SO, TO COME IN AND SAY THAT AT THIS POINT THAT

1 IF DEFENSE COUNSEL HAD RUN THAT MOTION AND DID HAVE THAT
2 INFORMATION, THE OUTCOME OF THE TRIAL WOULD HAVE BEEN
3 DIFFERENT. I DISAGREE. THEREFORE, I DON'T SEE A GROUND
4 FOR GRANTING A NEW TRIAL ON THE PITCHESS ISSUE.

5 THE SEARCH AND SEIZURE ISSUE IS A BIT MORE
6 COMPLEX. THERE ARE PRIMARILY THREE SUPREME COURT CASES
7 THAT THE COURT LOOKED AT IN DETERMINING WHETHER OR NOT
8 THE DEFENSE'S CHALLENGE IS MERITORIOUS.

9 MINNESOTA V. CARTER, WHICH IS AT 525 U.S. 83,
10 DEALT WITH A SITUATION IN WHICH SOME INDIVIDUALS WERE
11 OVERNIGHT GUESTS IN AN APARTMENT AND WERE DEALING DRUGS
12 ON A PARTICULAR DAY. AND IN THAT CASE, THE COURT
13 DETERMINED THAT PROPERTY USED FOR COMMERCIAL PURPOSES IS
14 TREATED DIFFERENTLY FOR FOURTH AMENDMENT PURPOSES THAN
15 RESIDENTIAL PROPERTY. PURELY COMMERCIAL NATURE OF THE
16 TRANSACTION, RELATIVELY SHORT PERIOD OF TIME ON THE
17 PREMISES, AND THE LACK OF CONNECTION BETWEEN THE
18 RESPONDENTS AND THE HOUSEHOLD LED THAT COURT TO BELIEVE
19 THAT THERE WAS NO REASONABLE EXPECTATION OF PRIVACY BY
20 THOSE INDIVIDUALS DEALING DRUGS.

21 AN ADDITIONAL CASE IS O'CONNOR V. ORTEGA,
22 WHICH IS AT 480 U.S. 709. THAT CASE BASICALLY HELD
23 WHETHER AN EMPLOYEE HAS A REASONABLE EXPECTATION OF
24 PRIVACY MUST BE DECIDED ON A CASE-BY-CASE BASIS.

25 AND THEN THERE WAS A CASE, NEW YORK V. BERGER
26 AT 483 U.S. 691, WHICH HELD THAT A BUSINESS OWNER'S

Clerk's transcripts pp. 238-259

Clerk's transcripts pp. 238-259

JAN 20 2006

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ORIGINAL

Dept. C-40

ALAN SLATER, Clerk of the Court

06 JAN 20 2006 PM Motions 92-10406 JUNIGA, DEPUTY
 DISTRICT ATTORNEY'S OFFICE
 SANTA ANA, CALIFORNIA

IN CUSTODY
REMOVAL REQUESTED7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**8 **FOR THE COUNTY OF ORANGE, CENTRAL JUDICIAL DISTRICT**9
10 PEOPLE OF THE STATE OF
 CALIFORNIA,

11 vs.

12
13 TUAN NGUYEN,

14 Defendant.

15 CASE NO.05CF1163

16
17 NOTICE AND MOTION FOR
 DISCOVERY PURSUANT TO
 E.C. SECTIONS 1043-1047;
 (PITCHESS) AND PURSUANT TO
 BRADY V. MARYLAND; POINTS,
 AUTHORITIES, ARGUMENT,
 DECLARATION OF COUNSEL IN
 SUPPORT THEREOF.18 **TO THE DISTRICT ATTORNEY AND THE CUSTODIAN OF RECORDS**
 FOR THE SANTA ANA POLICE DEPARTMENT:

19 NOTICE IS HEREBY GIVEN that on February 10, 2006, at 9:00 a.m., or as soon
 20 thereafter as the matter may be heard in Department C40 of the above-entitled court,
 21 defendant Tuan Nguyen will move, and by this notice now moves this Court for an order of
 22 discovery pursuant to Evidence Code sections 1043-1047 and pursuant to *Brady v. Maryland*,
 23 (1963) 373 U.S. 83.

24 Specifically, this motion seeks the identities of all persons that filed personnel
 25 complaints against the police officers involved in the subject incident. This request includes
 26 complaints of misconduct relating to excessive force, physical and/or verbal abuse, violations
 27 of citizen's Fourth Amendment rights, dishonesty and prior wrongful acts involving moral
 28 turpitude (including the falsification of police reports, false accusations of crime, perjury or

1 lying, harassment, bad temper, malevolence, bigotry, bias, prejudice or the misuse of
 2 equipment.)

3 The request for the identity of complainants includes their full names, aliases, last
 4 known residence and business addresses, home and work telephone numbers, California
 5 driver's license numbers, CII numbers, social security numbers, and other details that enable
 6 defendant to locate, question and subpoena said persons.

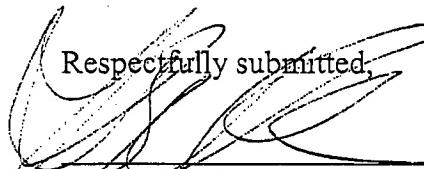
7 Defendant also seeks disclosure of psychiatric/psychological records within the
 8 officers' personnel record that are probative of the officer's propensity for violence, abuse of
 9 power, false report writing and/or dishonesty. (*See Lemelle v. Superior Court* (1978) 77
 10 Cal.App.3d 148, 164.)

11 The officers involved in the subject action are: **Investigators D. Lima (#2373) and R.**
 12 **Tolosa (#2353)**, of the Santa Ana Police Department.

13 This motion is made upon state statutory grounds and upon state and federal
 14 constitutional grounds. Specifically, it is made on the grounds that the personnel records of
 15 the above-listed officer contain evidence that is material to the defense of this case. That
 16 evidence is subject to disclosure under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-
 17 537, *Brady v. Maryland*, (1963) 373 U.S. 83, and California Evidence Code sections 1043
 18 and 1045, and is within the possession, custody and/or control of the Santa Ana Police
 19 Department.

20 This motion is based on this notice, the attached declaration of counsel, the attached
 21 points and authorities served and filed herewith, on all the papers and records filed in this
 22 action, and on such oral and documentary evidence as may be presented at the hearing of the
 23 motion.

24 Dated: January 19, 2006

Respectfully submitted,

 Kristin A. Erickson
 Attorney for Tuan Nguyen

1 **STATEMENT OF RELEVANT FACTS/PROCEDURAL HISTORY**

2 Defendant has been convicted of bribery in violation of Penal Code section 67 for
3 paying money to Investigators Lima and Tolosa on three dates: November 16, 2004,
4 December 7, 2004 and January 25, 2005. This court, having heard the testimony at
5 trial, is familiar with the facts that were presented at trial. Defendant has consistently denied
6 the acts and claims the officers demanded money from him after engaging in a long pattern
7 of abuse, harassment and actions violative of his constitutional rights at his place of business,
8 Happy Tanning.

9 The first (November) of the three offenses, when defendant allegedly made the first
10 offer, was not audio recorded. The second and third offenses were audio recorded. On the
11 second occasion (December), defendant was not present at the scene and he is not recorded.
12 On that day, Lima entered the business and walked directly to the back of the business and
13 opened a closed door. He testified that he interrupted two naked individuals on the floor. He
14 claimed that defendant called on his cell phone during this time and told the officer his wife
15 would take care of it. Lima indicated he was given two envelopes containing cash. On the
16 third occasion (January) defendant was present and was recorded. There is mention of
17 "fifteen" but there is no direct mention of any bribes by the defendant.

18 Trial counsel substituted in shortly before trial. Despite his defense these offenses did
19 not occur, he did not file a *Pitchess* motion. He made no attempt to discover any sort of
20 impeachment material to use in cross-examination of the officers. As set forth in the attached
21 declaration (Exhibit A) the material sought by way of this motion was critical in developing a
22 defense. Counsel's failure to do so, since the evidence would have been discoverable,
23 constituted incompetence and precluded counsel from adequately preparing for trial.

24

25

26

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28

POINTS, AUTHORITIES AND ARGUMENT

1

**DEFENDANT IS ENTITLED TO DISCOVERY OF COMPLAINTS AGAINST
INVESTIGATORS TOLOSA AND LIMA.**

The California Supreme Court has ruled that the basic principle underlying defense discovery in a criminal case stems from the "fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonable accessible information. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.) *Pitchess* made it clear that "'an accused. . . may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial!'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

11 These fundamental principles have been applied by the California Supreme Court to
12 allow criminal defendants to discover police personnel records. (*City of Santa Cruz v.*
13 *Municipal Court, supra*, 49 Cal.3d 74, 84.) The Legislature codified these discovery rules
14 (as they relate to police personnel records) in Evidence Code §§ 1043 to 1047. This
15 codification served to expand these principles of discovery as they relate to police personnel
16 records. As emphasized by the Supreme Court in *City of Santa Cruz*, "We have previously
17 held that the Legislature, in adopting the statutory scheme in question, 'not only reaffirmed
18 but expanded' the principles of criminal discovery articulated by this court in the landmark
19 case of *Pitchess v. Superior Court...*" (*Ibid.*)

20 A criminal defendant is entitled to discovery of any and all evidence that is both
21 favorable to the accused and material on the issue of either guilt or punishment. (*People v.*
22 *Abatti*, (2003) 112 Cal.App.4th 39, 51.) Normally, discovery in any given case is in the hands
23 of the prosecution, and the prosecution's failure to turn over such evidence violates the
24 accused's constitutional right to due process. (*Ibid.*) Since the requested evidence is not in
25 the hands of the prosecution, the *Pitchess* procedure is the sole means by which a criminal
26 defendant can obtain relevant and material information located in the personnel files of a
27 police officer that are in the hands of a third-party agency. (*Id.*, at 57.)

1 In order to obtain discovery of the type requested in this case, a criminal defendant
 2 must first meet the requirements of Evidence Code § 1043. The threshold showing here is,
 3 according to the California Supreme Court, "very low." (*City of Santa Cruz v. Municipal*
 4 *Court, supra*, 49 Cal.3d 74, 83.) The Supreme Court has rejected the notion that a defendant
 5 must follow the rather strict requirements of the various civil discovery procedures, noting
 6 that such a procedure would run counter to the protections of the Fifth Amendment to the
 7 United States Constitution in many instances. (*Pitchess v. Superior Court, supra*, 11 Cal.3d
 8 531, 536.)

9 Recently, the California Supreme Court has reaffirmed that the good cause
 10 requirement embodies a "relatively low threshold" for discovery and the supporting
 11 declaration may include allegations based on "information and belief." (*People v. Samuels*
 12 (2005) 36 Cal. 4th 96, 109 citing *City of Santa Cruz, supra*, at p. 94; *Brant v. Superior Court*
 13 (2003) 108 Cal.App.4th 100, 106 [Information is material if it will facilitate the
 14 ascertainment of the facts and a fair trial.]; *Abatti v. Superior Court* (2003) 112 Cal.App.4th
 15 39, 51 ["[A] declaration by counsel on information and belief is sufficient to state facts to
 16 satisfy the 'materiality' component of [Evidence Code section 1043]."]

17 On June 2, 2005, the California Supreme Court decided *Warrick v. Superior Court*
 18 (2005) 35 Cal. 4th 1011. The court confirmed the requirement set out in *City of Santa Cruz*
v. Municipal Court, supra, 49 Cal.3d at p. 84 that good cause for *Pitchess* discovery exists
 19 when the defendant shows both materiality and a reasonable belief that the agency has the
 20 type of information sought. (*Warrick, supra*, at p. 1027.) Furthermore, "A showing of good
 21 cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for
 22 trial court review of 'all potentially relevant documents.'" (*Ibid.*, quoting *City of Santa Cruz,*
supra, at p. 84.)

23 The Court of Appeal in *Warrick* erroneously believed that the defendant's showing of
 24 good cause must be "reasonably probable or inherently credible and not merely possible."
 25 (*Id.* at p. 1025-1026.) The Supreme Court rejected this definition of the defendant's burden
 26
 27

1 because it imposed a greater burden than required by prior cases or statute. (*Id.* at p. 1026.)
 2 Instead, "a plausible scenario of officer misconduct is one that *might or could* have
 3 occurred." (*Id.* at p. 1026, emphasis added.) The Supreme Court also explained that the
 4 trial court's task is *not* to weigh or assess the evidence. (*Ibid.*)

5 To determine whether the defendant has established good cause
 6 for in-chambers review of an officer's personnel records, the
 7 trial court looks to whether the defendant has established the
 8 materiality of the requested information to the pending
 9 litigation. The court does that through the following inquiry:
 10 Has the defense shown a logical connection between the
 11 charges and the proposed defense? Is the defense request for
 12 *Pitchess* discovery factually specific and tailored to support its
 13 claim of officer misconduct? Will the requested *Pitchess*
 14 discovery support the proposed defense, or is it likely to lead to
 15 information that would support the proposed defense? Under
 16 what theory would the requested information be admissible at
 17 trial? If defense counsel's affidavit in support of the *Pitchess*
 18 motion adequately responds to these questions, and states 'upon
 19 reasonable belief that the governmental agency identified has
 20 the records or information from the records' (§ 1043, subd.
 21 (b)(3)), then the defendant has shown good cause for discovery
 22 and in-chambers review of potentially relevant personnel
 23 records of the police officer accused of misconduct against the
 24 defendant.

25 (*Id.* at p. 1027.)

16 Character traits of complaining witnesses for traits relevant to the defense may be
 17 shown by specific acts, opinion, or reputation evidence. (Evidence Code §1103.) Once a
 18 defendant shows relevancy, that the material cannot be obtained otherwise, and generally
 19 specifies the material sought, the defendant is entitled to discovery of that material. (*In re*
 20 *Valerie E.* (1975) 50 Cal.App.3d 213.) Police personnel information is discoverable in cases
 21 where self-defense may not be a defense to the crimes charged. A showing of good cause
 22 merely requires a defendant seeking *Pitchess* discovery to establish not only a logical link
 23 between the defense proposed and the pending charge, but also to articulate how the
 24 discovery being sought would support such a defense or how it would impeach the officer's
 25 version of events. (*People v. Samuels, supra*, 36 Cal.3d at 1021.)

26 No personal statement of the intended defense by the defendant is required; an
 27 affidavit of counsel of what the defense "may" be (such as the defense may be self- defense)

1 suffices. (*People v. Memro* (1985) 38 Cal.3d 658; *Kelvin L. v. Superior Court.*, *supra*, 62
 2 Cal.App.3d 823.) There is no requirement whatsoever for a personal statement from the
 3 defendant. A *Pitchess* declaration authored by defense counsel alleging facts showing
 4 relevance is all that is needed, and the declaration need not be based upon personal
 5 knowledge, nor need it show there were prior complaints to get discovery. (*City of Santa*
 6 *Cruz v. Municipal Court*, *supra*, 49 Cal.3d 74.) Moreover, the defense is entitled to utilize an
 7 in camera proceeding to present its declaration if privileged material may be revealed. (*City*
 8 *of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255.) Finally, a
 9 criminal defendant is not required to furnish foundational facts about the information being
 10 sought, because the defendant is not in a position to know whether the complaints in fact
 11 established the custom, habit, intent, motive or plan which is being alleged. (*People v.*
 12 *Memro*, *supra*, 38 Cal.3d 65.)

13 It makes no difference whether or not the police agency sustained the complaints or
 14 exonerated the officer. The complaints remain discoverable regardless of any action or
 15 inaction taken by the police agency. (*People v. Zamora* (1980) 28 Cal.3d 88.) In addition,
 16 a criminal defendant is entitled to discover the discipline imposed upon a police officer as a
 17 result of citizen complaints of misconduct. (*City of San Jose v. Superior Court (Michael*
 18 *B.)* (1993) 5 Cal.4th 47.) Finally, a defendant is also entitled to discover all Board of
 19 Rights proceedings initiated against a police officer. These quasi-judicial administrative
 20 proceedings are presumptively open to the public and the final decision of a Board of
 21 Rights is considered a public record. (*Bradshaw v. City of Los Angeles* (1990) 221
 22 Cal.App.3d 908.) Any claim of privilege requires the imposition of sanctions when the
 23 material being sought is relevant to the defense. (*Dell M. v. Superior Court* (1977) 70
 24 Cal.App.3d 782.)

25 II.

26 DEFENDANT IS ENTITLED TO DISCOVERY OF ANY INVESTIGATIONS 27 CONCERNING INVESTIGATOR LIMA AND TOLOSA'S MISCONDUCT 28 INVOLVING MORAL TURPITUDE.

1 There can be no doubt that *Pitchess* discovery includes discovery of an officer's
 2 morally turpitidinous conduct. (*Samuels, supra*, 36 Cal.4th at 110; *Warrick, supra*, 35
 3 Cal.4th at 1027 [court found defendant met burden by outlining a defense raising the issue
 4 of the practice of the arresting officers to make false arrests, plant evidence, commit
 5 perjury, and falsify police reports or probable cause.] see also, *People v. Jackson* (1996) 13
 6 Cal.4th 1164, 1220 [overbroad discovery request is properly narrowed by the trial court to
 7 misconduct similar to that alleged]; *People v. Memro, supra*, 38 Cal.3d at pp. 681-683
 8 ["evidence that the interrogating officers had a custom or habit of obtaining confessions by
 9 violence, force" or threats would be admissible to support a coerced confession claim];
 10 *People v. Gill* (1997) 60 Cal.App.4th 743, 750 [prior complaints that arresting officer
 11 fabricated probable cause and planted evidence were material to defense that drugs were
 12 planted on a defendant charged with drug possession].)

13 In *People v. Hustead*, (1999) 74 Cal.App.4th 410, 417, the Court of Appeal held,

14 "[The People] argued at oral argument that *Pitchess* discovery motions are
 15 limited solely to issues of officer violence. Such is not the case. In *People*
 16 *v. Memro* (1985) 38 Cal. 3d 658, 214 Cal. Rptr. 832, 700 P.2d 446, the
 17 Supreme Court explained that the statutes governing discovery motions 'do
 18 not limit discovery of such records to cases involving altercation between
 19 police officer and arrestees; the context in which *Pitchess* arose.' (*Memro, supra*, 38 Cal. 3d at p. 679.) Indeed, the Court also noted that 'one
 20 legitimate goal of discovery is to obtain information 'for possible use to
 21 impeach or cross-examine an adverse witness' (*Foster v. Superior*
 22 *Court* (1980) 107 Cal. App. 3d 218, 227, 165 Cal. Rptr. 701.)' (*Id.* at p.
 23 677.) Likewise, other cases have held that *Pitchess* motions are proper for
 24 issues relating to credibility. (See *Larry E. v. Superior Court* (1987) 194
 25 Cal. App. 3d 25, 28-33, 239 Cal. Rptr. 264 [motion seeking discovery of
 26 complaints for 'aggressive behavior, violence or excessive force, improper
 27 police tactics, dishonest and racial or class prejudice' sufficient to require
 28 in camera review when minor alleged that he did not use force against the
 officers, that the officer's [sic] lied about his actions and planted evidence,
 and the information was relevant to show officers had a motive to lie and
 could show potential bias which would affect the officer's credibility as a
 witness]; *Pierre C. v. Superior Court* (1984) 159 Cal. App. 3d 1120, 1122-
 1123, 206 Cal. Rptr. 82 [discovery motion for records pertaining to 'racial
 prejudice, false arrest, illegal search and seizure, the fabrication of charges
 and/or evidence, dishonesty and improper tactics . . . ' sufficient because
 the minor alleged a defense of false arrest and alleged that a substantial
 issue at trial 'would be the character, habits, customs and credibility of the
 officers.'].]"

1 The California Supreme Court has repeatedly held that evidence of conduct
2 amounting to moral turpitude, should it exist, is admissible to help the trier of fact
3 determine whether any given witness is telling the truth or is the kind of person who
4 would subvert the truth-finding process. (*People v. Wheeler* (1992) 4 Cal.4th 284.)
5 The Supreme Court has never carved out an exception that allows police officers to
6 be able to testify unfettered by prior instances of morally turpitidinous conduct. No
7 witness is allowed to testify cloaked in a false aura of veracity. Because such
8 evidence is admissible at trial, there must also be a mechanism allowing the
9 discovery of this evidence by the defense. Although couched in terms of a
10 prosecutor's duty to disclose evidence favorable to the defense, the Court of Appeal
11 in *People v. Santos* (1994) 30 Cal.App.4th 169, held that constitutional Due Process
12 requires a defendant be granted discovery of this type of evidence of misconduct
13 involving moral turpitude.

14 In sum, prior instances of dishonest behavior are admissible to impeach the
15 credibility of testifying police officers. Prior instances of lying are admissible; prior
16 instances of threats of force are admissible; and any prior misconduct amounting to moral
17 turpitude is admissible to impeach a testifying witness. (*People v. Harris, supra*, 47 Cal.3d
18 1047, 1080-1082; *People v. Mickle, supra*, 54 Cal.3d 140, 168; *People v. Wheeler, supra*,
19 4 Cal.4th 284, 295- 297.)

20 It must be stressed that the Supreme Court did not create one rule for civilian
21 witnesses and a separate rule for police officers. The rule created by the Supreme Court
22 applies to all witnesses: if that witness has engaged in conduct amounting to moral
23 turpitude, that evidence is admissible to impeach the witness, subject only to the strictures
24 of Evidence Code § 352. A witness who engages in conduct amounting to moral turpitude
25 is a dishonest person who displays a morally lax character. This is true whether the witness
26 is a gang member who has strong-armed and bullied others or a police officer who uses his
27 or her badge as a shield to engage in improper conduct. The threshold standard established
28 by the Supreme Court is simply one of relevance. (*People v. Wheeler, supra*, 4 Cal.4th

1 284, 295-297.) The information being requested, if obtained by the defense, either would
 2 be admissible itself or would lead to the discovery of admissible evidence. Thus, the
 3 information is discoverable. (*In re Valerie E.* (1975) 50 Cal.App.3d 213.)

4 Here defendant alleges the officers were untruthful in their testimony. Further,
 5 defendant alleges the officers engaged in a pattern or hostility and a pattern of violation of
 6 his constitutional rights, particularly under the Fourth Amendment. Further, after years of-
 7 harassment, defendant claims he was, in essence, shaken down by the officers in question.
 8 Any complaints involving acts of moral turpitude would not only have impeached the
 9 officers, but could have been utilized in corroborating defendant's allegations of abuse.

10 III.

11 **DEFENDANT IS ENTITLED TO *BRADY* MATERIAL CONTAINED IN INV.
 12 TOLOSA AND LIMA'S PERSONNEL FILES, EVEN IF THAT MATERIAL
 13 IS MORE THAN FIVE YEARS OLD.**

14 *Evidence Code section 1045(b)(1)* limits discovery to complaints not more
 15 than five years old. However, discovery is grounded on the due process right to a
 16 fair trial. (*See People v. Rutherford* (1975) 14 Cal.3d 399.) Discovery of relevant
 17 information cannot be cut off merely because of the age of the information. Even a
 18 remote complaint can have a substantial probative value or lead to other
 19 information, and only defense counsel is in a position to investigate and develop its
 20 value effectively. Thus, material information contained in the officer's personnel
 21 files that is more than five years old must still be disclosed pursuant to *Brady v.*
Maryland, (1963) 373 U.S. 83 and its progeny.

22 *Brady* establishes that the prosecution has a non-delegable duty to seek out
 23 and provide to the defense evidence that is favorable to the accused and is material
 24 to either guilt or punishment, including impeachment evidence. This duty flows
 25 from the prosecution's obligation to ensure a fair trial. (*Kyles v. Whitley* (1995) 514
 26 U.S. 419, 439-440.) "Although a criminal defendant does not have a general
 27 constitutional right to discovery, under *Brady* 'the prosecution must disclose to the

1 defense any evidence that is "favorable to the accused" and is "material" on the
 2 issue of either guilt or punishment. Failure to do so [regardless of the good faith of
 3 the prosecution,] violated the accused's constitutional right to due process."

4 (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 52.)

5 Evidence is "favorable" if "it either helps the defendant or hurts the
 6 prosecution, as by impeaching one of its witnesses." (*Ibid.*) Moreover, evidence is
 7 "material" under *Brady* "if there is a reasonable probability that, had the evidence
 8 been disclosed to the defense, the result of the proceeding would have been
 9 different." (*Ibid.*) Impeachment evidence has been held to be material because
 10 "impeachment of a witness can make the difference between acquittal and
 11 conviction, especially where credibility is the major issue in a case and evidence at
 12 trial will consist of opposing stories presented by the defense and the prosecution
 13 witnesses." (*Ibid.*)

14 The prosecution's *Brady* obligation is neither dependent upon California's
 15 *Pitchess* discovery scheme nor limited by it. (*Pitchess v. Superior Court, supra*, 11
 16 Cal.3d 531; Evidence Code § 1043 et seq.) While *Brady* and *Pitchess* discovery
 17 may coexist and are even interrelated, *Pitchess* cannot serve to trump or limit the
 18 prosecutor's constitutionally based *Brady* obligations.

19 The California Supreme Court recently stated "the '*Pitchess* process'
 20 operates in parallel with *Brady* and does not prohibit the disclosure of *Brady*
 21 information." (*City of Los Angeles v. Superior Court (Brandon), supra* 29 Cal.4th 1
 22 at 14.) In *Brandon*, the court examined whether the five-year limitation on *Pitchess*
 23 discovery was constitutional. Although the *Brandon* court held that the 5-year
 24 limitation on *Pitchess* records (1045(b)(1)) is not unconstitutional on its face, the
 25 application of this holding is limited, and should not prevent this court from
 26 following *Brady* requirements to the extent that destruction of documents in police
 27 personnel files has not already taken place. In fact, the *Brandon* court so held,
 28 stating:

"In holding that routine record destruction after five years does not deny defendants due process, we do not suggest that a prosecutor who discovers facts underlying an old complaint of officer misconduct, records of which have been destroyed, has no *Brady* disclosure obligation. At oral argument, the Attorney General, appearing as amicus curiae on behalf of the City, agreed that, regardless of whether records have been destroyed, the prosecutor still has a duty to seek and assess such information and to disclose it if it is constitutionally material." (*Id.* at p. 9746.)

The *Brandon* court continued:

"The Attorney General, appearing as amicus curiae, advances a different view, which we find persuasive. The Attorney General asserts that the "Pitchess process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." We agree. As we recently explained in *People v. Mooc* (2001) 26 Cal.4th 1216, 36 P.3d 21, 114 Cal. Rptr. 2d 482, the *Pitchess* "procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial." (*Id.* at p. 1225.) In the Attorney General's view, citizen complaints older than five years that the trial court after in chambers review finds to be "exculpatory," as defined by *Brady*, "may be subject to disclosure, notwithstanding the five-year limitation in section 1045(b)(1)." (*Id.* at p. 9746.)

The *Brandon* court thus held that trial courts retain jurisdiction to review citizen complaints still in existence that are over five years old and to release them to the defense if the material is *Brady* material. The court held that the trial court was not foreclosed from reviewing and releasing citizen complaints by the statutory limitation in 1045(b)(1).

Relying on the California Supreme Court's decision in *Brandon*, the Court of Appeal in *Abatti v. Superior Court*, (2003) 112 Cal. App.4th 39, held that a criminal defendant is entitled to the discovery of *Brady* material greater than five years old that is contained in a police officer's personnel files. The *Abatti* court additionally explained that the proper method for obtaining such *Brady* information, especially if it is in the hands of a third-party agency, is by filing a *Pitchess* motion.

1 Abatti was charged with assault with a deadly weapon. (*Abatti, supra*, 112
 2 Cal.App.4th 43-44.) One of the prosecution witnesses, Jesse Torres, was working at a
 3 cycle center at the time of the alleged assault. He claimed Abatti came into the center
 4 immediately after the incident and admitted being present at the scene of the assault; he
 5 also "backed up" the victim's version of events. Torres had worked as a police officer
 6 for the Calexico Police Department 11 years prior to the assault.

7 Abatti filed a *Pitchess* motion with the Calexico Police Department, claiming that
 8 Torres was untrustworthy and had a history of fabricating facts. By way of the *Pitchess*
 9 motion, Abatti sought discovery of all relevant and material *Brady* information that would
 10 support his contention that Torres lied. The trial court denied Abatti's motion, stating that the
 11 records sought were far beyond the five-year limitation provided for under the *Pitchess*
 12 discovery statutes and that the information sought by Abatti was not material.

13 Relying on *Brandon*, the court of appeal reversed, holding that "the five-year
 14 limitation of Evidence Code section 1045 for disclosure of complaints or the exclusion of
 15 conclusions of investigations of those complaints in police officer records [is not] an absolute
 16 bar to information sought in the older police officer records." (*Id.* at 60.) The court further
 17 stated that California's statutory *Pitchess* process is the proper means by which a criminal
 18 defendant can obtain such information. Addressing the fact that *Abatti* sought records
 19 from Torres' former police agency employer, who was not involved in the investigation
 of Abatti's case, the court stated,

20 "because *Pitchess* procedure is the sole means by which
 21 information in confidential peace officer files can be obtained,
 22 the preclusion of review from the personnel records of a peace
 23 officer who may be a material prosecution witness because the
 law enforcement agency holding the files is technically not on
 the prosecution team in this case would defeat the rights of a
 defendant to exculpatory evidence." (*Id.*, at 58.)

24 The court went on to explain:

25 "As the court in *Ritchie* noted, a defendant has a due process
 26 right to gain access to material exculpatory evidence for the
 preparation of a defense. Similar to the circumstances in
Ritchie, the records sought in this case are confidential but
 27 available by court order if they are material to the issues in the

1 pending case. The difference between *Ritchie* and this case is
 2 that California has a legislatively established, exclusive
 3 method for gaining access to police officer personnel records
 for discovery of such exculpatory material – the co-called
Pitchess procedures previously discussed.”

4 In the present case, defendant is claiming that officers Lima and Tolosa engaged in a
 5 pattern of harassment, abuse and violation of defendant’s rights. Defendant alleges that the
 6 officers repeatedly engaged in a pattern of violating his rights under the Fourth Amendment.
 7 The officers harassed and abused many of the customers and employees. Further, it is likely the
 8 defense at trial would have been that defendant alleges the officers are the ones that initiated the
 9 request for money once defendant filed a complaint with the city against them and/or to assure
 10 defendant the harassment would stop. Further, it is believed that these officer have a pattern of
 11 engaging in this sort of conduct and that they had a personal bias against defendant.

12 Defendant is therefore seeking discovery of complaints from Lima and Tolosa’s
 13 personnel files that show they lack credibility by engaging in acts of moral turpitude, such as
 14 physical or verbal abuse, fabrication of police reports, assaults involving moral turpitude, or any
 15 other acts that show them to be generally untrustworthy. Said complaints will aid in defendant’s
 16 request for a new trial in that they would have provided a potential defense that was not
 17 investigated by trial counsel. Even if there are complaints going back more than 5 years
Brandon and *Abatti* make clear that a criminal defendant is entitled to *Brady* material.

18 IV.

19 **THE DECLARATION OF COUNSEL FILED IN SUPPORT OF DEFENDANTS**
MOTION DEMONSTRATES MATERIALITY OF THE REQUESTED DISCOVERY
UNDER BOTH *PITCHESS* AND *BRADY*.

20
 21 The declaration of counsel attached as Exhibit A clearly establishes that the discovery
 22 sought by way of this motion is material both under *Pitchess* and *Brady*. Thus, the requested
 23 records and files of Lima and Tolosa relating to assaultive conduct, physical or verbal abuse,
 24 patterns of systematically violating Fourth amendment rights, lack of credibility,
 25 impeachment/cross-examination evidence, prior wrongful acts involving moral turpitude,
 26

27

28

1 dishonesty, improper police tactics, and unprofessional/substandard police work are
 2 absolutely relevant and necessary to the defense.

3 Defense counsel's strategy at trial is unknown. It is clear he was arguing that
 4 defendant did not do that with which he was charged. The only way in which to effectively
 5 run that defense, however, was to cross-examine the officers as to their prior conduct,
 6 including the conduct alleged in counsel's declaration attached as Exhibit A. Further, it is
 7 believed that there is a likelihood that others have complained about the officers' pattern of
 8 abuse, misconduct and violation of constitutional rights. Counsel was under a duty to
 9 conduct a full investigation of this matter. He did not do so.

10 Defendant was entitled to the effective assistance of trial counsel. (*Strickland v.*
 11 *Washington* (1984) 466 U.S. 668.) A claim of ineffective assistance of counsel may be raised in
 12 a motion for new trial prior to the pronouncement of judgment. (*People v. Fosselman* (1983) 33
 13 Cal.3d 572.) A defendant's right to counsel encompasses the right to effective counsel which
 14 means that counsel will conduct all inquiry and strategy only when well - prepared regarding
 15 issues of law and fact. ". . . [T]he defendant can reasonably expect that in the course of
 16 representation his counsel will undertake only those actions that a reasonably competent attorney
 17 would undertake. But he can also reasonably expect that before counsel undertakes to act at all
 18 he will make a rational and informed decision on strategy and tactics founded on adequate
 19 investigation and preparation. [Citations.] If counsel fails to make a decision, his action - no
 20 matter how unobjectionable in the abstract - is professionally deficient." (*People v. Ledesma*
 21 (1987) 43 Cal.3d 171, 215.) Counsel failed to do that prior to trial and this motion must be
 22 granted now in order to properly proceed in a motion for new trial.

23 The documents requested are not only material under the more "relaxed" *Pitchess*
 24 standards, but are material under *Brady* as well. As explained above, defendant was
 25 convicted of bribing these two officers. According to the officers, the offers of cash came
 26 out of the blue after over a year of arrests of girls for prostitution at defendant's place of
 27 business. In fact, the officers had been harassing defendant at his place of business over

1 many years. They stepped up their patrol over the year prior to November 2004. The
 2 officers testified that they had made approximately 16 arrests over the 10 months preceding
 3 November. However, the officers did not mention that they came to the business on a daily
 4 basis, came into the business, busted into the tanning rooms, which were closed. On only a 6
 5 occasions were arrests made. Of the sixteen people arrested in those 6 days, 15 were either
 6 charged and/or convicted. During the course of those daily visits, the officers were abusive,
 7 both verbally and physically. They threatened the girls. They threatened customers.

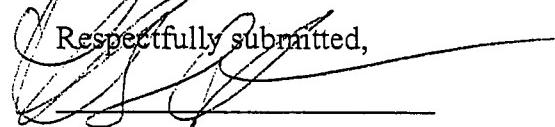
8 The only way the defense could have effectively confronted, cross examined, and
 9 impeached the officers' credibility is to receive discovery from his personnel files of other
 10 similar instances of excessive force, physical abuse, lack of credibility, veracity, fraud, moral
 11 turpitude, dishonesty, untruthfulness, neglectful duty, and/or unbecoming conduct.

12 As explained in *Abatti*, "impeachment of a witness can make the difference between
 13 acquittal and conviction, especially where credibility is the major issue in a case and
 14 evidence at trial will consist of opposing stories presented by the defense and the prosecution
 15 witnesses." (*Abatti v. Superior Court*, *supra* 112 Cal.App.4th at 52.) Credibility was the
 16 most critical issue in defendant's case. Since the evidence sought by defendant to impeach
 17 could have made the difference between his guilt or innocence as determined by a jury,
 18 defendant has demonstrated that the information sought is both favorable and material under
 19 *Brady*. (*Id.*, at 59.).

20 CONCLUSION

21 For the reasons set forth above and set forth in the attached declaration, defendant
 22 respectfully requests this Honorable Court to grant the requested discovery and order
 23 disclosure of the information sought or dismissal of the above entitled action.

24 Dated: January 19, 2006



Respectfully submitted,

25 KRISTIN A. ERICKSON

26 Attorney for defendant Nguyen

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EXHIBIT A

1 **DECLARATION OF COUNSEL IN SUPPORT OF REQUEST FOR DISCOVERY**

2

3 I, Kristin A. Erickson, hereby declare as follows:

4 1. That I am an attorney licensed the practice law in the state of California
5 2. That I represent the defendant Mr. Tuan Nguyen in this matter. The facts herein
6 stated are personally known to me of firsthand knowledge, except as to those matters stated
7 on information and belief, and if called as a witness I could testify to the following:

8 3. Defendant was charged and convicted of bribing Investigators Tolosa and Lima in
9 connection with his business, Happy Tanning in Santa Ana.

10 4. Defendant was represented by Frank Barilla at trial. Mr. Barilla substituted in as
11 counsel within days of the case being set for trial. Mr. Barilla did not conduct any
12 investigation, nor did he file any written motions prior to trial. There is no indication he ever
13 requested or received discovery regarding the prior arrests at Happy Tanning. He did not
14 contemplate or run a *Pitchess* motion, nor did he request a continuance in order to determine
15 whether one was necessary. Barilla generally attacked the officers' credibility and his
16 general defense was that things were not as they appeared in the evidence presented. He
17 intimated that the officers were lying or misrepresenting what actually occurred but he did
18 not impeach them with any prior misconduct or actions that may have eroded their
19 credibility.

20 5. In a case like this, where the defense depends upon attacking the credibility of the
21 officers, it is critical to run a *Pitchess* motion to discover if the complaints made by the
22 defendant have been made by others. It is critical to see if, as here, the officers have
23 fabricated evidence in the past. Some impeachment material was available to counsel, but
24 others required a request for discovery, such as the reports of prior visits to Happy Tanning
25 and a request for the officers' personnel files. Counsel did neither and his failure to do so
26 constitutes incompetence as this evidence is of critical importance in developing any defense.

27 6. The officers testified at trial that they had been conducting an ongoing
28 investigation over the 10 months prior to November 2004. They testified that they had made